S. Hrg. 101-664

JUDICIAL IMMUNITY

HEARING

BEFORE THE

SUBCOMMITTEE ON

COURTS AND ADMINISTRATIVE PRACTICE

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 590

A BILL TO PROHIBIT INJUNCTIVE RELIEF, OR AN AWARD OF DAMAGES AGAINST A JUDICIAL OFFICER FOR ACTION TAKEN IN A JUDICIAL CAPACITY

OCTOBER 25, 1989

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JUDICIAL IMMUNITY

WEDNESDAY, OCTOBER 25, 1989

U.S SENATE,
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:50 p.m., in room SD-226, Dirksen Senate Office Building. Hon. Howell Heflin (chairman of the subcommittee) presiding.

Also present: Senator Thurmond.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. The subcommittee will come to order.

Good afternoon, I am sorry we are late in getting started. I would like to welcome you to the Senate Judiciary Subcommittee hearing on judicial immunity.

In 1868, the need for judicial immunity was explained in the following manner:

> It is essential in all courts that judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor, without fear.
>
> This provision of the law is not for the protection nor the benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences.

Although the statement was written more than 120 years ago, I believe it is just as applicable today as it was then. Certainly, judicial independence is no less important today as it was in 1868.

Unfortunately, this independence has been severely eroded by the 1984 U.S. Supreme Court decision in *Pulliam* v. *Allen.* In *Pulliam,* a sharply divided 5 to 4 court held that the doctrine of judicial immunity neither prevents injunctive relief in Federal civil rights actions challenging decisions of a State judge, nor bars attorney fee awards against the judge. In essence, *Pulliam* disregards four centuries of unbroken precedent and destroys an ancient doctrine that is the bedrock of the Anglo-American system of justice.

Understandably, this decision has caused a tremendous amount of concern among our Nation's judicial officers. Indeed, at the time *Pulliam* was handed down, the Conference of Chief Justices said of that decision: "No development in recent times has aroused greater concern on the part of State judges." If anything, that concern is greater today. Judges fear that this decision will have a chilling effect on judicial independence in both State and Federal courts, and I agree with them.

The ability of a judge to decide a case, without fear, is of paramount importance to judicial effectiveness. It is a cornerstone of our judicial system. Harassing litigation brought by disappointed parties against judicial officers can only result in the increasing timidity of judges, along with a tendency to avoid close and controversial decisions whenever possible. Consequently, the threat of a potential suit alone is enough to substantially impair the exercise of independence by judges.

In addition to the chilling effect of *Pulliam* on judicial independence, my colleagues in the judicial branch are concerned that this decision will create a new class of Federal litigation against State decisions. State court plaintiffs are placed, in effect, in a position of appealing to the Federal courts to enjoin State court action when they should be in State courts appealing through the State judicial system. This encroachment on the doctrine of federalism destroys comity between the two separate but equal judicial systems. State judges cannot act effectively if their decisions, no matter how closely they are made in keeping with State laws, are subject to immediate challenge in the Federal courts.

The Court in *Pulliam* challenged us to remedy this situation by stating, "That it is for Congress, not this Court, to determine whether and to what extent to abrogate the judiciary's common-law immunity." Congress must accept this challenge, and S. 590 is meant to do just that. A similar bill passed the Judiciary Committee of the 100th Congress, and it is my hope and desire that the full Senate will have an opportunity to consider S. 590 in the 101st Congress.

I look forward to hearing from our distinguished witnesses. In the interest of time, I would like to remind the witnesses to summarize their prepared statements, which will be placed in the record in their entirety, and to try to limit their summarized statements to 5 minutes.

Representatives from the ACLU and the NAACP legal defense fund were also invited to testify at this hearing. Those chose not to be here today. Their testimony, in addition to the testimony submitted by the Alliance for Justice, will be included in the hearing record.

We are delighted to have a distinguished group of jurists here to testify. Senator Thurmond is here.

Senator Thurmond, do you have an opening statement?

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Very briefly. Thank you, Mr. Chairman.

We are here today to consider S. 590, a bill which would prohibit injunctive relief and the award of attorneys fees against judicial officers acting in their judicial capacity. This bill, of which I am an original cosponsor, addresses the erosion of judicial independence resulting from the Supreme Court decision in *Pulliam* v. *Allen*.

In a case of statutory interpretation, the Supreme Court in *Pulliam* held that judicial immunity is not a bar to injunctive relief or an award of attorneys fees against a judicial officer acting in his official capacity. This is simply not appropriate. Congress must rectify the omission of these prohibitions by amending the relevant Federal statutes.

The notion of judicial independence is deeply imbedded in our common law heritage. It is essential to insure justice, because judicial officers must be free to make appropriate decisions within their official capacity without fear of reprisal. An independent judiciary is a vital component in any democracy which cannot be compromised.

Mr. Chairman, this bill before us today will restore the independence of State court justices and judges. If enacted, it will prevent injunctive relief actions against State court judges. Under this bill, claim for attorneys fees in a Federal action will no longer subject judges to the threat of personal liability. As a result, judges will administer the law independently, without fear of persecution.

I am most interested in this issue and look forward to hearing from the witnesses that will testify today.

Thank you, Mr. Chairman.

[A copy of S. 590 follows:]

II

101st CONGRESS
1st Session

S. 590

To prohibit injunctive relief, or an award of damages against a judicial officer for action taken in a judicial capacity.

IN THE SENATE OF THE UNITED STATES

March 15 (legislative day, January 3), 1989

Mr. Heflin (for himself, Mr. DeConcini, Mr. Grassley, Mr. Thurmond, Mr. Hatch, Mr. Simpson, Mr. Ford, and Mr. Gorton) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To prohibit injunctive relief, or an award of damages against a judicial officer for action taken in a judicial capacity.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting before the period at the end thereof ", except that in any action brought against a judicial officer for an act or omission committed in such officer's judicial capacity—

"(1) such officer shall not be liable for costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction; and

"(2) injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable".

SEC. 2. Section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by adding before the period at the end of the first sentence: ", except that in any action brought against a judicial officer for an act or omission committed in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable".

SEC. 3. Notwithstanding any other provision of law, no judicial officer shall be held liable for any costs, including attorney's fees, in any proceeding brought against such judicial officer for an act or omission taken in a judicial capacity.

○

Senator HEFLIN. We are pleased to have Chief Justice Harry L. Carrico here, of the Supreme Court of Virginia, who is the president of the Conference of Chief Justices; the Honorable Phillip J. Roth, judge, fourth judicial district of Portland, OR, on behalf of the American Bar Association; the Honorable Joseph R. Weisberger, associate justice of the Supreme Court of Rhode Island on behalf of the American Bar Association; the Honorable Thomas C. Nurre, judge, court of common pleas, president of the American Judges Association; and former Congressman Caldwell Butler, attorney, from Roanoke, VA.

We are delighted to see all of you.

Chief justice, if you would, you may begin.

STATEMENT OF HON. HARRY L. CARRICO, CHIEF JUSTICE, SUPREME COURT OF VIRGINIA; AND PRESIDENT, CONFERENCE OF CHIEF JUSTICES, ROANOKE, VA

Justice CARRICO. Thank you, sir.

Mr. Chairman, I am here today in my role as president of the Conference of Chief Justices, as a surrogate for our preferred witness, Chief Justice Edwin J. Peterson, of the Supreme Court of Oregon. He is chairman of our Committee on Judicial Immunity and our resident expert on the subject at hand. Unfortunately, he is unable to be here today and my remarks, accordingly, will be brief. I will ask that his prepared statement be made a part of the record of the committee.

Senator HEFLIN. Without objection, it will be.

[The prepared statement of Justice Peterson follows:]

STATEMENT OF EDWIN J. PETERSON

CHIEF JUSTICE, SUPREME COURT OF OREGON

AND

CHAIRMAN, COMMITTEE ON JUDICIAL IMMUNITY

OF THE

CONFERENCE OF CHIEF JUSTICES

ON S. 590

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

SENATE JUDICIARY COMMITTEE

OCTOBER 25, 1989

Mr. Chairman and Members of the Subcommittee. The Conference of Chief Justices appreciates this opportunity to express its support for legislation that would restore and protect the ancient doctrine of judicial immunity that is the bedrock of the Anglo-American system of justice. I am Edwin J. Peterson, Chief Justice of the Supreme Court of Oregon and chairman of the Conference's Committee on Judicial Immunity/Pulliam v. Allen.

We are greatly in you debt, Mr. Chairman, for the forum this hearing provides for discussion of the critical problems posed for the immunity doctrine, and our system of federalism, when federal judges impose attorney fee awards and prospective injunctive relief on judges in the state court systems.

But because I testified before the subcommittee last year this statement is necessarily repetitive. Nothing has happend in that time to change the historic facts or the basic issues that concern us.

At the threshold, it is important to separate what we seek from what we do not seek. Under the Supreme Court's decision in Pulliam v. Allen[1] state judges now can be enjoined from acts subsequently found to impinge on federal constitutional rights and attorney fees now can be recovered from judges incident to such injunctive relief. We are not here to seek modification of anyone's rights. But we do seek immunity from the award of attorney fees and the opportunity to resolve any question of constitutional rights in the state courts before a federal court can intervene.

As you may recall, we first informed the Congress of our concerns about these issues shortly after Pulliam was handed down by a sharply divided (5-4) Supreme Court on May 14, 1984. At that time we said of the decision: "No development in recent times has aroused greater concern on the part of state judges". If anything, that concern is greater today.

First, a brief summary of of the case. Gladys Pulliam, a magistrate in Culpeper County, Virginia, had apparently set bail for Richmond Allen and Jessie Nicholson for certain offenses which were nonjailable under Virginia law. This resulted in both Allen and Nicholson being incarcerated for a period of time for failure to make bond, although they were charged with offenses for which the maximum penalty in Allen's case was a $500 fine and in Nicholson's, a $100 fine. After their cases were disposed of, Allen and Nicholson became plaintiffs in an action pursuant to 42 U.S.C. 1983 against Magistrate Pulliam. A judge of the District Court for the Eastern District of Virginia found that Margistrate Pulliam made it her practice to require bond for nonincarcerable offenses, found the practice to be unconstitutional on due process and equal protection grounds, and enjoined her from further actions of a similar nature.

In addition to the injunctive relief, the District Court awarded $7,691.09 to the plaintiffs as costs including a counsel fee of $7,038. Magistrate Pulliam, claiming judicial immunity, appealed only from the award of counsel fees. The Court of Appeals for the Fourth Circuit determined that the magistrate was not immune from an award of counsel fees, nor was she immune from prospective injunctive relief. The Supreme Court affirmed, expressly holding that the venerable common law doctrine of absolute judicial immunity is not a bar to injunctive relief in federal civil rights (42 USC 1983)[2] actions against a member of the state judiciary acting in a judicial capacity, or to the award of attorney fees against the judge under 42 USC 1988[3].

Nothing has occurred since Pulliam came down to lessen our concerns. On the contrary, data from surveys completed for us by the National Center for State Courts indicate that our fears were and continue to be well founded and that state judges face continuing exposure to fee awards in cases challenging their judicial as well as other official decisions.

We are here today because we firmly believe, as did the four dissenting justices in Pulliam, that the decision seriously breaches the doctrine of absolute judicial immunity and therefore threatens the independence that is at the heart of the judicial function. State judges cannot act effectively if their decisions, even when reasonably and conscientiously made in keeping with state law, are subject to immediate challenge in the federal courts and the legal costs that involves. This central point was made by Justice Powell, speaking for the minority in Pulliam:

> "The Court affirms a $7,691 money judgment awarded against a state magistrate on the determination that she made erroneous judicial decisions with respect to bail and pretrial detentions. Such a judgment poses the same threat to independent judicial decisionmaking whether it be labeled 'damages' of $7,691 or 'attorney's fees' in that amount ... The burdens of having to defend such a suit are identical in character and degree, whether the suit be for damages or prospective relief. The holding of the Court today subordinates realities to labels. The rationale of the common-law immunity cases refutes the distinction (between fees and damages) drawn by the Court."

The majority agreed that "there is, perhaps, some logic" to the argument that "the chilling effect of a damages award is no less chilling when the award is denominated attorneys's fees." But they went on to say "that it is for Congress, not this Court, to determine whether and to what extent to abrogate the judiciary's common-law immunity." Only Congress can mend this breach in the ancient doctrine of judicial immunity.

Before proceeding with a discussion of the remedy we now think necessary I should again note that we are not seeking to bar anyone's right to a judicial forum for complaints alleging unconstitutional actions by state judges. Our concerns are over the procedures for such review sanctioned by the Supreme Court because of the peculiar manner in which the issues were presented to it in Pulliam. In the first instance we do not believe there was need for injunctive relief in Pulliam because adequate remedies were available, as the minority noted, under Virginia law. But this issue did not come directly before the court because Magistrate Pulliam did not appeal the injunction, but only the subsequent fee award, limiting her defense to the doctrine of judicial immunity. However, in order to get to the fee issue, the Court had to rule first on the propriety of the injunctive relief.

We are of course concerned with that portion of Pulliam which held that Congress, by failing to grant a specific exemption for judges in the Civil Rights Attorney's Fees Awards Act of 1976 (amending 42 USC 1988), intended that judges be liable for fee awards and accordingly intended to curtail their common law immunity to that extent. But we also are concerned with the very serious issues of comity, federalism, and the orderly administration of justice that arise when federal courts intervene in state court proceedings on issues that can readily be resolved by the state courts themselves. In short, we do not believe there is need for a federal judge to enjoin a state judge in a federal civil rights action absent a showing of an inadequate remedy at law within the state court system and a serious risk of irreparable harm, the criteria normally applied to requests for equitable relief.

We believe that Pulliam — both the Court's opinion and the dissent — supports this view. The Court discussed but did not decide the propriety of the injunctive relief granted against Magistrate Pulliam because, as the Court noted, she did not appeal the injunction itself but limited her appeal to the subsequent fee award. With the issues framed in this form the Court found, reluctantly we believe, that judicial immunity itself, the only defense raised, was not a bar to prospective injunctive relief. But the Court went on to make it clear that:

> "In so concluding, we express no opinion as to the propriety of the injunctive relief awarded in this case. Petitioner did not appeal the award of injunctive relief against her. The Court of Appeals therefore had no opportunity to consider whether respondents had an adequate remedy at law, rendering equitable relief inappropriate, or whether the order itself should have been more narrowly tailored. On the record before us and without the benefit of the Court of Appeals' assessment, we are unwilling to speculate about these possibilities." (emphasis added)

Thus, the Court appeared to say that had Magistrate Pulliam appealed the injunction itself and shown an adequate remedy at law within the state system, it might well have decided differently.

Accordingly, the Conference of Chief Justices supports the approach taken by S. 590 which would not only bar fee awards against judges but would bar injunctive relief unless a declaratory decree was violated or declaratory relief was unavailable. But we continue to prefer language, such as Sec. 4, S. 1515 as reported by the Judiciary Committee in the last Congress, which would require that all issues be resolved in state courts, whenever possible, before federal courts could intervene. We see little difference between declaratory and injunctive relief if federal intervention is unnecessary and inappropriate to begin with.

Thus, we continue believe Congress should not only bar fee awards against judges under 42 U.S.C. 1988 but should bar any federal intervention, declaratory or injunctive, if a remedy is available under state law and there is no serious risk of irreparable harm.

You will recall that the Attorney's Fees Act was passed by Congress in response to the Supreme Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society[4]. In that decision the Court held that federal courts, which had been awarding fees to prevailing plaintiffs under their equity powers, could no longer do so absent specific authority from Congress. Because such statutory authority was lacking in the Reconstruction Civil Rights Acts, including 42 USC 1983, Congress moved quickly to fill the gap. A bill was signed into law on October 11, 1976, only 17 months after the opinion came down. The Senate Judiciary Committee, indeed, reported the bill without hearings, relying on earlier hearings on legal fees conducted by the Subcommittee on Representation of Citizen Interest in 1973.[5]

We might not be here today if this body, when processing the Attorney's Fees bill, had been made aware of the judicial interests at stake Unfortunately, state judiciaries were not represented in Washington at that time and did not review or take a position on the bill. There was little if any participation by state and local officials, executive, legislative, or judicial. Certainly there was no serious discussion of the doctrines of absolute legislative and judicial immunity as distinct from the limited immunity doctrines applicable to officials of the executive branch. While Congress did not specifically exclude judges from the Act it did not show a specific intent to include them either. As best we can determine, the issue simply was not discussed. There is no specific comment in the Senate report; certainly no reference to any intent to limit judicial immunity or to create a new right to fees against judges. Instead, the report made it clear that:

> "This bill creates no startling new remedy -- it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys'

fees which had been going on for years prior to the Court's (Aiyeska) decision."[6]

The House report limited its comments to two sentences, citing a particular need for counsel fees where "immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy." A footnote to this comment cited three Supreme Court decisions discussing qualified immunities. Only one of these, Pierson v. Ray,[7] involved a judicial officer, who was held immune from damages in an opinion by Chief Justice Earl Warren that included powerful statements in support of the doctrine of absolute judicial immunity. Because legal fees against the judge were not at issue, and because the case also involved police officers who were found to have a qualified immunity, the House report, in context, should be read as citing a need for legal fees in cases against executive officials protected by limited "good faith" immunity. Therefore, we must conclude that Congress's failure to specify one intent or the other on judicial immunity was meant to ratify prevailing practice that did not include fee awards against the judiciary in cases involving injunctive relief.

We have not been able to locate the Senate hearings[8] from 1973 but it appears from the House hearings,[9] held in October and December of 1975, that we are correct in concluding that the doctrine of judicial immunity was not at issue. Sponsors of the bill made it clear at all stages of the legislative process that the only intent was to restore the status quo ante by providing the statutory authority for fee awards required by Alyeska. The principal Senate sponsor of the legislation, John V. Tunney, said:

> "The purpose of this bill is simple -- it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil rights statutes ... It therefore restores to the federal courts authority which they had exercised for years until a little over 2 months ago." [10]

Similarly, Robert W. Kastenmeier, chairman of the House subcommittee with original jurisdiction over the bill, said:

> "This is a first step and a rather limited and cautious one. It does not overturn law or practice, except the Alyeska case ..."[11]

He went on to say, in tacit recognition of the hasty manner in which the legislation was considered, that the issue of fee shifting "needs much further analysis than this session would allow." It is our hope, then, that Congress will give the doctrine of judicial immunity the attention it deserves and amend 42 USC 1988 to restore it to its historic form and assure its preservation.

We do not intend to burden this hearing with an extended discusson of judicial immunity. The corpus of case law and scholarly literature on the subject is immense and we would be pleased to provide recent studies, including discussions of the Pulliam decision, for the hearing record.[12] We take it for granted that there is no serious disagreement with the proposition that judicial immunity is essential to the Anglo-American system of justice. The United States Supreme Court, including the Pulliam court, has never wavered in its support for the doctrine as it involves direct damages against a judge for judicial decisions made in the exercise of proper jurisdiction. This was true even where commission of a tort was alleged to be corrupt or malicious.[13] It was true, that is, until the Pulliam court, relying on 42 USC 1988 as amended in 1976, permitted a fee award which it agreed could have the same "chilling effect" as an award of damages.

That a "chill" has gone through the ranks of state judges is beyond dispute. The reaction to Pulliam was powerful and immediate, involving individual judges and judicial and bar organizations at the local, state, and national levels. The Conference of Chief Justices, acting at its first meeting after the decision came down, expressed its alarm by passing resolutions (1) calling on Congress to restore the judiciary's common law immunity by amendment of 42 U.S.C. 1988, (2) urging the Judicial Conference of the United States to study the issue and support corrective legislation, and (3) creating a Task Force of the Conference of Chief Justices to study and report back to the Conference on the extent of the problems raised by the decision.[14] We are particularly pleased that the Judicial Conference, the American Bar Association and its Section of Judicial Administration, the American Judges Association, the National Association of Women Judges as well as many state judicial councils and bar associations have joined in the call for a legislative response. This means that the top policymaking officials of those most directly involved, including the state and federal judiciaries and the legal profession, see a threat to judicial immunity that requires action by Congress.

As I have indicated, this threat is confirmed by studies conducted for the Conference of Chief Justices by the National Center for State Courts. The first of these shows that the treat is real and widespread and that it involves judges' personal liability even when sued for decisions made in their official capacities. The summary of the findings is brief and can be quoted in whole:

> "Approximately half of the respondent Chief Justices reported that their jurisdictions have neither statutory indemnification nor insurance coverage for judges involved in litigation concerning their official duties. Fifteen states reportedly have indemnifiction statutes; another four appear to have some type of state indemnity practice. Only nine states provide statutory immunity to their judges. Fourteen respondents reported that their jurisdictions have insurance that pays for some or all of

the expenses involved in the litigation of claims against judges.

"Although almost all of the states have representation provided by the Attorney General (or other public legal office), specific information on the types of coverage for damages and attorney's fees provided under insurance policies and indemnification statutes is not comprehensive and was unknown by many respondents.

"Legislative activity to remedy the situation is currently minimal. Although 46 respondents reported not having judicial immunity statutes, 72% responded that such legislation is not being sought. Similarly, in the 40 states without statutory indemnification, 60% are not seeking such protection.

"Slightly more activity is being directed toward the procurement of insurance. Forty-five percent of the respondents report current negotiations for state-provided judicial insurance. Forty-four percent report that individual judges are beginning to purchase their own insurance policies."[15]

It is clear from this summary that the states, long relying on the doctrine of judicial immunity as the only protection needed for their judges, are not prepared to meet the present threat and that many judges are being forced to seek a limited and doubtful form Of protection through insurance policies purchased at their own expense. The salaries of state judges, I need not remind you, do not make them an affluent class capable of absorbing large economic losses or adequately insuring themselves against them. The study was published in 1985 from data gathered in the late summer and fall of 1984.

The second study of interest covers the period from January 1982 to March 1985 and records a total of 957 cases filed against state judges and nonjudicial court personnel under 42 U.S.C. 1983. . This recently was updated to include filings through 1987 when the total reached 1,974 cases. All but eight of the 48 states responding to the initial survey reported case filings against judges and court personnel under the act. Forty-five states and the District of Columbia responded to the second survey. Noting the difficulty of collecting data on specific types of case filing, the report stated that, "If there is a weakness in the data it is undoubtedly one of underrepresenting the volume of litigation — rather than overstating it."

While the volumne of reported cases fluctuated over the period covered the filings averaged 329 per year, a level that causes us great concern.

The bulk of these cases, the initial study found:

"...are being brought by disgruntled litigants who view Section 1983 as a means of redress against judges who have ruled against their interests in previous lawsuits. It is clear from the case statistics that very few of the cases are decided (or settled) favorably to plaintiffs. Yet, in only a very few of these suits have attorney's fees and costs been awarded against the plaintiff for the 'frivolous' nature of the suit."

The study also reports that:

"Despite the fact that many of these suits are brought pro se, or by litigants not represented by counsel, the yearly statistics indicate a steady and slightly increasing level of requests for attorney fees. In almost all of the successful cases, 'prevailing plaintiffs' have either been awarded attorney's fees or had their cases settled for a figure that takes into account and represents the costs of representation.

"A final important finding is the fact that although most of the cases are brought against judges for actions committed within their judicial roles, the successful cases (with only a few exceptions) concern administrative or nonadjudicative conduct."[16]

It is clear that costs imposed on local, state, and federal governments under federal fee shifting statutes are an ever growing burden. While the overwhelming majority of fee awards are against officials of the executive branch, the judiciary, as indicated by the study above, has been increasingly involved, primarily in civil rights actions challenging decisions by judges in their rulemaking, enforcement, and administrative or magisterial roles as well as in the adjudication of cases. For many state judges, particularly those with rulemaking and management responsibilities, suits challenging their non-judicial actions may be the most burdensome. Thus, the Conference of Chief Justices has supported legislation that would remove the threat of fee awards in cases challenging all actions taken by judges in their official capacities. However, in light of the Supreme Court's most recent pronouncement on the reach of judicial immunity in Forrester v. White (No. 86-761) decided January 12, 1988, we have amended our position to exempt only judicial or adjudicatory actions of judges as distinct from actions taken in an administrative capacity.

Such fees, particularly when incident to federal injunctive relief, are unnecessary and counterproductive. They are unnecessary because, as we have noted, adequate remedies are available within state judicial systems through the normal channels of appeal or other routine remedies. They are counterproductive because they serve no public interest more important to a free society than the doctrine of judicial immunity underlying the detachment and integrity of the judicial process. The threat of catastrophic economic loss, however subtle, necessarily undermines that process and therefore undermines the rights of all. In the Pulliam case, as we have noted, the original complaint protested incarceration for failure to make bail on a non-jailable offense. This complaint was taken directly to a federal district court, bypassing the Virginia district and appellate courts with full power to provide relief under Virginia law. The final claims for attorney's fees in this case were in excess of $80,000 and resulted in a final settlement between $40,000 and $50,000 for which the state magistrate, as we understand it, was personally liable. Fortunately for her the burden was assumed by the state but charged against the budget of the judiciary where, presumably it required a cutback in judicial services available to the people of Virginia.

The long and complex history of immunity doctrines attests to the judiciary's need, along with that of legislators and prosecuting attorneys, for a stricter standard than that generally granted to the executive officials that Congress had most clearly in mind in passing the Attorneys Fees Act in 1976. More so than most if not all public officials judges are personally charged with responsibility for discretionary decisions affecting the most precious rights of their fellow citizens. There will be one or more disgruntled parties in virtually every judicial proceeding, civil or criminal. Judges, obviously, are in the business of judging, and to judge in the United States today is to weigh the merits of conflicting claims and rights against requirements of the most complex and volatile body of law known to man. Our system therefore recognizes that judges may err and provides for the correction of judicial error through appeal by right to higher tribunals. Thus, judges make difficult factual and legal determinations on a daily basis and routinely rule on unsettled questions of law or settled questions that can change on appeal. Under Pulliam such decisions now can come back to haunt state judges in the form of injunctive relief and attorney's fees ordered by a federal district court.

Even more intimidating, as Justice Powell noted in his dissent in Pulliam, is the threat of contempt if a state judge, in the view of a federal judge, fails to adequately implement the federal court's injunctive order. The order at issue in Pulliam, as Justice Powell noted, contained language requiring discretionary action by the state magistrate involved. This led Justice Powell to conclude that:

> "The threat of contempt -- with the possibility of a fine or even imprisonment -- could well deter even the most courageous judge from exercising this discretion independently and free from intimidation."

Surely Congress did not intend, in a limited and carefully crafted reaction to the Alyeska decision, to encourage or set the stage for so dramatic an extention of federal judicial power over state judicial proceedings.

We do not suggest that state judges should be completely beyond the reach of the federal courts to redress violations of federally protected rights if the state courts fail to do so. Nor would anything we propose affect existing rights to redress routinely available by writ of certiorari in the Supreme Court of the United States and by writ of habeas corpus in federal district courts. But we do contend that state courts are as dedicated to the protection of federal rights as are the federal courts and that error, if it occurs, normally can be corrected on appeal within the state court systems. Surely we can now agree that state courts should no longer be compared to some courts of the turbulent Reconstruction Era whose transgressions were among those by state officials that led Congress to enact restraints on state action violating federally protected rights. This view was endorsed by the Pulliam Court which agreed that "Much has changed since the Civil Rights Acts were passed. It no longer is proper to assume that a state court will not act to prevent a federal constitutional deprivation or that a state judge will be implicated in that deprivation."

Under the Supremacy Clause, the oath of state judges requires the same fidelity to the Constitution and laws of the United States as does the oath of their colleagues on the federal bench.

There is little reason to believe that state judges are violating that oath, or that they are uninformed on questions of federal law, especially at the appellate level. As former Chief Justice W. Ward Reynoldson of Iowa stated in testimony before the Senate Judiciary Committee, "there is hard evidence to show how intertwined state and federal law has become." Among the 281 published opinions of the Iowa Supreme Court in 1981, he said, 150 involved criminal appeals. Seventy-two of these opinions cited a total of 327 federal decisions. In addition, 53 federal cases were cited in eight post-convictions and 57 civil cases cited a total of 188 federal opinions. Twenty of the opinions, he added, cited the United States Code and 27 cited the federal rules of civil or criminal procedure or the federal rules of evidence. "I am convinced," Chief Justice Reynoldson said, "that Iowa appellate justices spend almost as much time in the federal reporters as in state reporters. Downgrading the sense of responsibility, experience and training of modern-day state judges ignores the enormous strides made in state judicial systems."[17] That is a view I emphatically share as would the overwhelming majority of my colleagues on state supreme courts. And all of us could, I am certain, cite similar statistics illustrating the increasing importance of federal rules, procedures, and case law in state adjudications.

Moreover, the trend has been away from federal courts to state courts. There is growing evidence of the important role state courts are playing in the development of constitutional law, particularly in the expansion of individual rights, through interpretation of their own state constitutions. On this point Justice William Brennan has said:

> We can and should welcome this development in state constitutional jurisprudence -- indeed, my own view is that this rediscovery by state supreme courts of the broader protection afforded their own citizens by their state constitutions -- spawned in part certainly by dissatisfaction with the decisional law being announced these days by the United States Supreme Court -- is probably the most important development in constitutional jurisprudence in our times. For state constitutional law will assume an increasingly more visible role in American law in the years ahead."[18]

In a similar vein, Lanny Proffer, general counsel for the National Conference of State Legislatures, has noted that:

> The die is cast. state judiciaries seem willing, even determined, to assume a larger role in judicial federalism. Though lacking in the independence born of life tenure, state justices are attacking the hard cases: abortion funding, freedom of expression and criminal procedure. It seems ordained that much

> of the constitutional law for the rest of the century will be made in state courts on the issues that most affect the individual: drug testing, education reform, AIDS, civil liberties, environment and economics.
>
> This is not to denigrate the role of the federal courts, particularly the U.S. Supreme Court, which will continue its pre-eminence. But anyone who considers the work of those who drafted our federal Constitution cannot fail to be encouraged that the state courts are now filling the role intended for them: to take care that the liberties of the people are protected from encroachment from whatever source. That task is big enough to accommodate the justices of the federal and state benches.[19]

The importance of new developments in state constitutional law also is attested by the growing number of articles and scholarly seminars on the subject as well as the fact that state supreme court decisions now are being reported nationally through the "State Constitutional Law Bulletin" of the National Association of Attorneys General. The American Civil Liberties Union also appears to have taken note of this trend and, according to the Legal Times, was looking for "appropriate ways" to raise state constitutional issues in state courts in order to shield certain criminal law issues from review by the Supreme Court of the United States.[20]

In the final analysis Pulliam is destructive because it deters state judges from enforcing the law. Hardly a week goes by without a judge of the courts of Oregon receiving threats of suits by disgruntled litigants. Some judges, in face of the threat of a substantial attorney fee award say, "It's not worth it," and yield.

Let me give an example of this threat from my own experience. Oregon has a statute that provides for the recapture of a portion of the fees paid by the state to counsel assigned to indigent defendants. Before ordering such repayment by the defendant the case must be closed and the court must determine that he is financially able to bear the expense.[21]

Under this statute a trial judge assessed an indigent defendant, who was acquitted of a criminal charge, with the cost of the court-appointed attorney's fee. The defendant brought suit against me as Chief Justice in the United States District Court, requesting injunctive relief, Fitch v. Belshaw.[22]

The federal judged ruled in favor of the plaintiff and entered an award of attorney fees against me in the sum of $35,000. The court held:

"Oregon Revised Statute 135.055(6) allows a

> judgment to pay costs of court-appointed counsel to be entered against an indigent defendant, with no procedure to insure defendant is or will be able to repay without substantial hardship. In practice, the State draws attention to the potential obligation at the time an indigent defendant requests court-appointed counsel. I find that ORS 135.055(6) unconstitutionally chills an indigent's exercise of Sixth Amendment right to counsel."
>
> " * * * * * *
>
> "Oregon Revised Statute 135.055(6) cannot be constitutionally applied in absence of the safeguards of procedural due process. The statute provides neither notice nor hearing. There is no evidence that the State's practice is to supplement the statute with the necessary elements of due process. As a result, indigent defendants are deprived of liberty and property in violation of the Fourteenth Amendment Due Process Clause."

It is important to note that this case involved actions of judges enforcing statutes passed by the Oregon legislature, according to the terms of the statute. Therefore, it involved claims against judges for enforcing laws which, under their oath, they were required to enforce.

As one who has had the experience I wish I could assure you that the threat of substantial attorney fee awards does not to any degree divert judges from conduct they believe to be fair, correct and constitutional. But judges are human and in reality the potential for such suits bring to bear all that is necessary to divert a judge's attention from deciding the cases before him to defending against the possible suit. This potential for intimidation can subtly affect judicial decisions whether we like to admit it or not. Legislators enjoy immunity from personal liability if acts they pass are later determined to be unconstitutional. Should not judges enjoy immunity from the award of attorney fees for enforcing their laws? Judges take an oath to uphold the law. Freedom from the award of attorney fees under Section 1988 is essential if they are to do so and we are to maintain an independent judiciary.

A mere contemplatation of the problems confronting state and municipal judges would indicate beyond any doubt that imposing the straight jacket of injunctive limitations upon a judge will destroy his or her usefulness to a far greater extent than the possibility of a suit for damages. Indeed, I suggest that once a judge has been enjoined by an order restricting his or her discretion, the usefulness of that judge is, to all practical intents and pruposes, eliminated. Many times a state judge will not know that he or she has made a mistake until the Supreme Court of the United States issues a new opinion which may destroy the constitutional base upon which the state judge thought the action to be founded. No great citation of authority is needed to establish the proposition that the Supreme Court of the United States has in recent years made a number of changes in its constitutional adjudication that affect the daily decisions of state judges, particularly in relation to the exclusionary rule.

The specter of harassing litigation brought by disappointed parties against judicial officers of all types of jurisdiction is a chilling prospect, indeed. At a time when the courts of this country are overburdened with litigation, at a time when citizens seek redress in the courts for a greater variety of perceived wrongs than ever before, it seems ill-advised to add a new layer of distracting litigation upon the shock troops of the judicial system. Such flank attacks upon judicial officers can only result in increasing timidity and a tendency to avoid close and controversial decisions when ever possible. It inevitably produces a syndrome of responses inconsistent with an American judiciary dedicated to the protection of individual liberties.

Finally, Mr. Chairman, we should not forget that state courts existed before the federal system and for the first 100 years of our national life were the courts of original jurisdiction for federal as well as state law questions. Because they remain the only courts of general jurisdiction, and their jurisdiction cannot be restricted by Congress as can that of the lower federal courts, it is reasonable to view state courts as the ultimate forums for the protection of rights under the federal as well as state constitutions. Modern state courts are responsible components, and partners, in the most fair, sophisticated, and effective system of justice ever devised by man. They should not be viewed as inferior tribunals requiring daily oversight by individual judges on the federal bench. We are confident that Congress, after full deliberation, will share that view and grant us the relief we seek.

Thank you again for bringing this critical issue to the attention of Congress.

Notes

1. 446 U.S. 522 (1984)

2 42 U.S.C. 1983 reads:
"Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3 42 U.S.C. 1988 reads in pertinent part:
"In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

4 421 U.S. 240 (1975)

5 Senate Report No. 94-1011, 94th Congress, 2d Session. The Report states that there were 30 witnesses, including "Federal and State public officials", during six days of hearings in 1973. But it does not identify the public officials or indicate what their testimony might have been.

6 Senate Report No. 94-1011 at 6.

7 386 U.S. 547 (1967)

8 These are not available via the Senate Judiciary Committee's Document Room.

9 "Awarding of Attorneys' Fees", Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, 94th Congress, 1st Session, October 6, 8, and December 3, 1975. Serial No. 64.

10 121 Cong. Rec. S. 14975 (daily ed., Aug. 1, 1975),

11 122 Cong. Rec. 35126

12 Recent articles include "The Twilight of Judicial Independence — Pulliam V. Allen", by Justice Joseph R. Weisberger of the Supreme Court of Rhode Island, Suffolk University Law Review, January 1986. The Summer 1982 edition of "The State Court Journal", published by the National Center for State Courts, Williamsburg, Va., contains articles tracing the history of the judicial immunity doctrine, a national survey of suits against judges, and a review of recent literature on judicial immunity.

13 The key cases before Pulliam v. Allen are discussed in the "State Court Journal" cited above.

14 The Conference of Chief Justices' Official policy position: "Urges the United States Congress to exempt state judges and judicial officers, acting in their official capacities, from assessment of attorney fees pursuant to 42 U.S.C. 1988."

15 In "Survey of State Statutes and Current Activities Regarding Judicial Immunity, Indemnification and Insurance", conducted by the National Center for State Courts, Williamsburg, Va., for the Conference of Chief Justices Ancillary Committee on Judicial Immunity and Ancillary Task Force to Prepare Report on Impact of Pulliam v. Allen, January 1985.

16 In "42 U.S.C. 1983 Litigation Against Judges: Survey Results", prepared by the National Center for State Courts for the Conference of Chief Justices Task Force to Prepare a Report on the Impact of Pulliam v. Allen, September 1985.

17 In Hearings of the Senate Judiciary Committee, 97th Congress, 2d Session, on S. 2216, The Habeas Corpus Reform Act of 1982, April 1, 1982, Serial No. J-97-108, at 238.

18 Quoted by Paul Marcotte in "Federalism and the Rise of State Courts", ABA Journal, April 1, 1987, Page 64.

19 "State Courts and Civil Liberties", in State Legislatures, September 1987, Page 28, National Conference of State Legislatures, Denver, Colo.

20 "Supreme Court v. Civil Liberties, The ACLU's New Strategy of Avoidance", the Legal Times, June 1, 1987. Also see "State Courts Move Beyond U.S. Bench in Rights Rulings, Cite Own Constitutions", The New York Times, Sunday, May 4, 1986, Page 1-A. Two national conferences on developments in state constitutional law have been sponsored by the Conference of Chief Justices in conjunction with the National Center for State Courts and the Marshall-Wythe School of Law of the College of William and Mary, Williamsburg, Va. A major "Seminar on State Constitutional Law" is scheduled in Washington, D.C. March 11, 1988 by the National Association of Attorneys General.

21 The statute provides:

"Upon completion of all services by the counsel appointed pursuant to ORS 135.045 or 135.050, the court shall determine whether the person for whom counsel was appointed is able to pay a portion of the compensation and expenses paid by a county or the state. In determining whether the person is able to pay such portion, the court shall take into account the other financial obligations of the person, including any fine or order to make restitution. In addition to any agreement to repay under ORS 135.050(4), if the court determines that the person is able to pay such portion, the court may order the person to pay the portion to the appropriate officer of the county or state."

22 USDC, Or., Civ. No. 83-991-PA.

Justice **Carrico**. We appreciate this opportunity to again present our, Mr. Chairman, on a matter that lies at the heart of the judicial function, and thus at the very heart of the rule of law. There can be no question but that judicial immunity, as we have known it through some 400 years of common law in England and the United States, was not designed to protect judges from criminal or other sanctions to which they may be subject for illegal, unethical or abusive behavior. Nor do we seek such protection today.

Indeed, the judicial immunity we ask for in S. 590 applies only to those decisions judges make daily in the adjudication of cases over which their courts have the requisite jurisdiction, that is, the sought-for immunity would apply only to decisions judges must make in the proper discharge of their judicial duties. It does not apply to other official actions incident to the judicial office or necessary to the operation of the courts, such as administrative decisions on the hiring or discharge of court personnel.

The typical lawsuit against a State judge under the Federal civil rights statutes involves a decision made by the judge in keeping with the State law he is sworn to uphold. It is unconscionable, in our view, for the judge to incur personal liability for doing what he is required by law to do.

That is the core problem S. 590 is designed to correct, and it would correct the problem without denying any citizen his or her day in court.

The legislation, Mr. Chairman, would do nothing more than restore judicial immunity to its status prior to *Pulliam* v. *Allen*. It would do what the Supreme Court itself suggested Congress must do if judges are to perform their vital and difficult role without fear of becoming defendants themselves in costly litigation. I say to you in all honesty, Mr. Chairman, that we simply cannot do our job if we have to keep one eye on the courtroom door anticipating a visit by a Federal marshal.

This is the third Congress and the third set of hearings in which the issues have been discussed in great detail. The legislation is sponsored by the Nation's leading organizations composed of members of the judiciary and the legal profession: The Judicial Conference of the Untied States, the American Bar Association, the Conference of Chief Justices, the American Association of Judges, and the Association of Women Judges.

It is inconceivable that these organizations, each dedicated to the preservation of individual rights under the rule of law, would support these modest proposals if they posed any real threat to the rights of our citizens.

It is a simple fact, Mr. Chairman, that the right to collect attorneys' fees from judges did not exist prior to *Pulliam* and the right as it now exists, based on a 5-to-4 decision, interpreting a single statute that did not even address the issue of judicial immunity. The only fundamental right or law at issue here is the ancient common law doctrine of judicial immunity that has provided the concrete in the foundation of our legal system since colonial times.

I shall leave the very important issues of federalism, comity and the powerful technical arguments in support of judicial immunity to my colleagues and to Chief Justice Peterson's prepared statement.

But I do want to say, Mr. Chairman, that we in the State judiciaries think it is long past time for Congress to act on the very serious problem posed for us by *Pulliam*. There has been no showing that judicial immunity from attorney fee awards led to any substantial number of instances similar to *Pulliam*. But there has been ample evidence to show the critical importance of such immunity to the protection of individual rights and the rule of law throughout our history.

We think it ironic that mistrust of State court systems should have delayed action on this issue at a time when State supreme courts have been expanding individual rights beyond Federal minimums through interpretations of their own State constitutions, and at a time, as you know, Mr. Chairman, when the courts of virtually every State have made remarkable and successful efforts to improve the administration of justice in the State systems.

These efforts were underway well before *Pulliam* and will continue, we trust, well after *Pulliam*, has faded into history.

Mr. Chairman, both you and your colleagues spoke of judicial independence eloquently. Another important and familiar figure in our history also spoke about it with eloquence and conviction. Chief Justice John Marshall, in a speech before the Virginia Constitutional Convention of 1829-30, in speaking to the judiciary article of that Constitution, said:

> The Judicial Department comes home, in its effects, to every man's fireside, it passes on his property, his reputation, his life, his all. Is it not to the last degree important that a judge should be rendered perfectly and completely independent, but with nothing to control or influence him but God and his conscience?

Sir, that was appropriate in 1829, it is still appropriate in 1989.

Thank you, sir.

I would also like to make a part of the committee's record a most recent survey and update of litigation against judges, prepared by the National Center for State Courts, sir. They are the figures you can see.

Senator HEFLIN. Without objection, it is so ordered.

Justice CARRICO. I would be glad to answer any questions, sir.

[The survey referred to above and additional submissions for the record follow:]

42 U.S.C. §1983
Litigation Against Judges:
1988 Survey Results

Conference of Chief Justices

Task Force to Prepare a Report on
the Impact of Pulliam v. Allen.

July 1989

National Center for State Courts
Information Service*

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*The Information Service is supported by assessments from all fifty states and a grant from the State Justice Institute.

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INTRODUCTION

In 1984, the United States Supreme Court in Pulliam v. Allen[1] held for the first time that, notwithstanding judicial immunity, federal courts may grant injunctive relief[2] and attorney fees[3] in federal civil rights actions against state court judges. At its 1984 annual meeting, the Conference of Chief Justices, an organization of the nation's state court judicial leadership, expressed its concern over the Pulliam decision and resolved to appoint from its membership a task force to develop studies concerning the impact of Pulliam v. Allen on the independence of the judiciary.

The Ancillary Task Force to Prepare a Report on the Impact of Pulliam v. Allen met at the 1985 Conference of Chief Justices midyear meeting and issued the First Report[4]. The Task Force found that inadequate information on the volume of litigation filed against state court judges was a major obstacle to studying judicial liability and developing solutions to the problems. As a result, the Task Force decided to survey all states to collect data on the volume of 42 U.S.C. §1983 lawsuits filed against state court judges and other court personnel.

In March, 1985, the chair of the Task Force to Prepare a Report on the Impact of Pulliam v. Allen requested the National Center for State Courts to prepare a report on the volume of 42 U.S.C. §1983 lawsuits filed against state court judges and other court personnel from January 1982 to April 1985. The 1985 report, 42 U.S.C. §1983 Litigation Against Judges: Survey Results (National Center for State Courts, September, 1985), revealed the following:

1. Between 1982 and the first quarter of 1985, there was an increase in the number of suits filed against judges.

2. The bulk of lawsuits filed against judges were brought by disgruntled litigants who view 42 U.S.C. §1983 as a means of redress against judges who have ruled against them in previous lawsuits.

3. Many lawsuits filed against judges were brought pro se (by litigants not represented by counsel).

4. Few 42 U.S.C. §1983 cases brought against judges were decided favorably for plaintiffs.

5. Attorney fees under 42 U.S.C. §1988 and court costs were rarely awarded against plaintiffs for the frivolous nature of their suits.

6. The successful cases brought against judges for actions committed within their official capacity concerned administrative or nonadjudicative conduct. Prevailing plaintiffs usually were awarded attorney's fees or had their cases settled for a figure that took into account the costs of representation.

In January, 1988, at the request of the Conference of Chief Justices' Pulliam v. Allen Task Force, members of CCJ were again surveyed to update previous survey responses and to provide information on 42 U.S.C. §1983 cases filed against judicial officers and court personnel since June 1986. A summary of the 1988 survey follows.

1988 Survey Summary

Survey questionnaires were mailed to each Chief Justice in mid-January 1988 requesting information on 42 U.S.C. §1983 lawsuits filed against judicial and nonjudicial officers since June 1, 1986 and to update previously reported cases pending against judges and court personnel. The requested response date was February 22, 1988. Information about §1983 suits filed against judicial and nonjudicial officers in California was not available from either the California Administrative Office of the Courts or the Office of the Attorney General. As a result, survey questionnaires were mailed in April, 1988 to 1,397 active judges listed on the California Judges Association membership, as had been done in 1985. Seventy-one (71) judges, or 5%, responded to the survey. California judges who responded to the 1985 survey mailing were also requested to update cases they previously reported as pending.

Questionnaires from twenty-five (25) states were initially returned. In March, National Center for State Courts staff telephoned Chief Justices who did not respond to the survey questionnaire or the office, state agency or department that the Chief Justices had referred the request to. Five survey responses were received as a result of these calls. By the end of June, survey questionnaires had been received from thirty states.

A second survey questionnaire was mailed in early July to Chief Justices of the twenty (20) states, the District of Columbia and four territories who had not responded to the first survey questionnaire. Survey questionnaires from twelve states and the District of Columbia were returned, and a draft summary report of the 1988 survey findings was prepared in September, 1988. By December, 1988, forty-five states and the District of Columbia had responded to the Pulliam v. Allen survey questionnaire, a response rate of 82%.[5] No United States territory responded to the 1988 survey.

This report is based on the 1988 survey questionnaire responses from the forty-five states and the District of Columbia, and case information collected in 1986 and reported in 42 U.S.C. §1983 Litigation Against Judges: Survey Results (National Center for State Courts, 1985). This report does not list every lawsuit filed against judicial and nonjudicial officers in the United States. The responses to the survey questionnaire provide a fair description of the patterns of litigation that have emerged. Many respondents commented that it was difficult to secure case information to respond to the survey because the requested information had to be manually researched and retrieved, which was a major reason for the slow survey response. Respondents in jurisdictions with automated dockets also indicated the difficulty of retrieving cases and the possibility of oversight.

The first section of this report provides a descriptive profile of the number and types of lawsuits filed against judicial officers and court personnel in each state. This section also summarizes the comments made by respondents to the survey. The second section provides statistical information on the following: (1) number of 42 U.S.C. §1983 lawsuits filed against judges and court personnel in each state; (2) the capacity (judicial or administrative) in which judges were sued; (3) the number of 42 U.S.C. §1983 suits with judgments or settlements favorable to defendants and plaintiffs; (4) the number of 42 U.S.C. §1983 lawsuits filed against judicial officers in which attorney fees were requested under 42 U.S.C. §1988 and awarded to plaintiffs; and (5) the number of §1983 lawsuits filed against judicial and nonjudicial personnel in each state with outcomes favorable to defendants and attorney fees awarded.

I. Descriptive Profile of 42 U.S.C. §1983 Lawsuits Filed Against State Court Judges and Court Personnel in Each State.

The following section describes the number and types of 42 U.S.C. §1983 civil rights actions filed against judicial and nonjudicial court personnel in each jurisdiction between 1982 and 1987. Information about §1983 lawsuits filed before 1982 and after 1987 are not included in this report's statistical analysis although cases filed during these periods may be cited and/or discussed in the text of this report. Case information, particularly on judgments or settlements against judges and attorney fee awards, is provided.

Alabama

Jack C. Dixon of the Supreme Court of Alabama reported that seventeen §1983 lawsuits have been filed against state court judicial officers and three against court clerks. Attorney fees were requested in seven cases and awarded in one case, Green v. Harbin, CV 82-C-5598 NE (D. Ala. filed Oct. 15, 1982). In Green, the only successful case filed by a plaintiff, state circuit court clerks and circuit and district court judges were sued to declare the state's garnishment statutes unconstitutional; the statutes did not require defendants to receive written notice of their statutory exemption rights. Plaintiffs also sought injunctive relief against further garnishment proceedings until the constitutional violation was removed. The U.S. District Court ruled in favor of plaintiffs and entered a final decree and injunction against the defendant class. Plaintiffs were awarded $24,880.69 against all state district and circuit court clerks for attorney fees and costs under 42 U.S.C. §1988. The State of Alabama was ordered to pay the sum to the clerk of the U.S. District Court. Judgments favorable to defendants were entered in twelve cases. The types of claims filed against judicial officers included: improper judicial conduct; unconstitutional rules governing admission to the state bar; and unconstitutional judicial elections. Seven cases are presently pending.

Alaska

Janalee Strandberg, staff counsel to the Alaska Court System, reported that seven §1983 lawsuits have been filed against state court judges. Attorney fees were requested in two suits, however, no attorney fee awards have been granted. Defendants have prevailed in four cases. There have been no judgments or settlements favorable to plaintiffs. Three cases are presently pending. In one pending case, Cassity v. Alaska, A85-681 Civ (D. Alaska. filed Dec. 18, 1985), plaintiff asserts that the judge negligently appointed a receiver and improperly awarded property in a divorce case. No case information was provided for the two other pending cases.

American Samoa

No case information was received in 1988. It was reported in 1985 that no §1983 suits had been filed against judges or nonjudicial officers.

Arizona

Although the Attorney General's office in 1985 and 1986 reported that no §1983 lawsuits had been filed against judges in the state, the Administrative Office of the Courts reported in 1988 that four §1983 suits have been filed against state court judges since 1982. One case was filed in 1982, another in 1985, and two were filed in 1986. Attorney fees were not requested in any of the cases. Judgments favorable to defendant judges have been entered in three cases. One case is pending.

Arkansas

The state judicial department indicated that no 42 U.S.C. §1983 lawsuits have been filed against judges or nonjudicial officers in Arkansas.

California

The California Administrative Office of the Courts and the California Office of Attorney General could not provide information on §1983 lawsuits filed against California judges. As a result, survey questionnaires were mailed to 1,397 active members of the California Judges Association in April, 1988. Seventy-one judges, 5% of the survey, responded. According to the survey, sixty-seven §1983 lawsuits have been filed against state court judges since 1982. Two §1983 suits have been filed against sheriffs and one case has been filed against the state court administrator. Most of the claims filed against judges concern judicial conduct in child custody, criminal and divorce matters, as well as employment and race discrimination. Although attorney fees were requested in thirty-three cases, no attorney fee awards have been granted. Judgments favorable to defendant judges or court officers were entered in thirty-nine cases. Plaintiffs have been successful in two suits. In Walker v. Keebaugh, the plaintiff settled for $300. In Fontes v. Beverly Hills Municipal Court, an employment case, the plaintiff also entered into a settlement agreement. Twenty-nine cases are pending.

Colorado

Nancy V. Jordan of the Office of the State Court Administrator reported that one hundred and twenty lawsuits have been filed against state court judges and five against court personnel. Attorney fees were requested in twenty-four cases and awarded to plaintiffs in one case and defendants in two cases. Since 1982, plaintiffs have prevailed in two lawsuits. In one of those cases, Helminski v. Supreme Court of Colorado, No. 83 JM 2054 (D. Colo. filed 1983), plaintiff successfully sued the Colorado Supreme Court regarding the state's residency requirement for admission to the state bar. The attorney fee issue was settled out of court for $3,500. Defendants in two cases were also awarded attorney fee awards. One successful lawsuit brought by plaintiffs and settled in 1986, Weathers v. Traylor, 80-M-1238 (D. Colo. filed 1980), was filed outside the survey period and is not included in this report's statistics. In that case, however, a class of juvenile plaintiffs sued the state of Colorado for violating the civil rights of juveniles by incarcerating them in adult correctional facilities. Parties settled the case, which included improvements in jail conditions and awarding damages of approximately $2,000 to each juvenile defendant. County and state correctional officials settled legal fees for approximately $60,000; the judicial department settled legal fees for $35,000. Judgments favorable to defendants have been entered in eighty-five cases. Thirty-seven cases are pending.

Connecticut

Chief Justice Ellen A. Peters reported in 1985 that no Pulliam lawsuits had been filed against court personnel. Since the 1985 report, Joseph Keefe, Executive Secretary of the Judicial Department, reports that five Pulliam cases have been filed against state court judges and one against a court clerk. Although attorney fee requests were made in five cases, no attorney fee awards have been granted. Plaintiffs have not prevailed in any of the reported cases. Defendants prevailed in four cases. Two cases are pending.

Delaware

John J. Polk, Deputy Attorney General, reported that nineteen lawsuits have been filed against state court judges. Attorney fees were requested in four cases and granted in two. In Brown Lee v. Oberly, 84-210 MMS (Dist. Ct. Del., 1984), defendants were awarded $4,450 in attorney fees. In Gittman v. Wilmingston Trust Co., defendants received $3,000 in attorney fees. Plaintiffs prevailed in one case, Cristiano v. J. P. Court, C.A. 86-149 MMS (Dist. Ct. Del., 1986). Plaintiff successfully challenged the constitutionality of an attachment in lieu of summons statute and requested $90,000 in attorney fees. The court has yet to rule on the attorney fees request. Defendants have prevailed in thirteen cases. Five cases are pending.

District of Columbia

James F. Lynch, Deputy Executive Officer of the District of Columbia Courts, reported that in addition to the seven §1983 lawsuits that have been filed against trial court judges, one lawsuit has been filed against the Executive Officer of the D.C. courts and two clerks have also been sued. Although requests for attorney fees were made in three cases, no attorney fee awards have been granted. Defendant judges have prevailed in six cases. One case was ruled in favor of the plaintiff. In Karpoff v. Jenkins, 83-1281-Civ. (D.C., filed 1983), plaintiff sued the court for wrongful seizure, arrest and detention, and settled the case for $100. Three cases are pending.

Florida

Glen G. Rubin of the Office of the State Court Administrator reported that eighty-five §1983 lawsuits have been filed against state court judges and two against nonjudicial officers. One additional lawsuit was filed against an officer of the court during the survey period; however, it could not be determined whether the defendant was a judicial or nonjudicial officer. Attorney fees were requested in six cases, however, no attorney fee awards have been granted. Plaintiffs have not prevailed in any case. Defendants have prevailed in thirty-five cases. Fifty-two cases are pending. The types of §1983 claims filed against judges include: unlawful imprisonment; conspiracy; denial of due process; abuse of legal process; jail assault; denial of child custody; and dissatisfaction with judicial decision.

Georgia

Sixty-four §1983 lawsuits have been filed against state court judges in Georgia. Requests for attorney fees were made in eighteen cases and granted in two cases. In Thomas v. Bibb County, CIV 82-22-1-MAC (D.C. Ga., filed 1982), plaintiff was granted an attorney fee award of $1,000. In Sunn v. Dean, a judge ordered the plaintiff to pay defendant's attorney fees because of the frivolous nature of the lawsuit. Since 1982, one judgment has been entered in favor of the plaintiff. In Thomas v. Bibb County, an African-American court reporter claimed racial discrimination in her nonselection as an official court reporter and sued four trial court judges and the county of Bibb. The case was settled. In Doss v. Long, a case not included in the survey because it was filed in 1981, plaintiffs successfully challenged Georgia's fee system as being unconstitutional. Plaintiffs were awarded injunctive relief under §1983 and an attorney fee award of $24,475. Defendants have prevailed in fifty-five cases. Eight cases are presently pending. Three cases were filed pro se. The Georgia Department of Law indicated in its response to the survey that the Office of the Attorney General does not represent lower court judges in §1983 suits and that little, if any, case information about §1983 claims filed against lower court judges was provided to them. The types of claims filed against court officers include: improper handling of habeas corpus claims; mishandling domestic suits; improper handling of pro se suits; deprivation of property; and denial of admission to the bar.

Guam

Presiding Judge Paul J. Abbate reported in 1985 and 1986 that no Pulliam v. Allen suits were filed against judges in Guam. No response was received in 1988.

Hawaii

No survey response was received in 1988. The Supreme Court reported in 1985 that twelve civil rights actions were brought against state court judges between 1982 and 1985. Six additional cases were reported in

1986. Of the total 18 cases reported in this survey, seven were brought pro se. Requests for the payment of attorney fees were made in six cases. No attorney fee awards, however, have been granted. Plaintiffs have not prevailed in any case. Defendants have prevailed in twelve cases. Six cases are pending.

Idaho

Laurie Demko of the Idaho Supreme Court reported that fifteen §1983 lawsuits have been filed against state court judges in Idaho. Requests for attorney fees were made in twelve cases and awarded in two. In Fanning v. Idaho, Civ No. 87-3001 (D. Idaho. filed Jan. 2, 1986), defendant was awarded $275 for attorney fees and court costs. In Yellen v. Ada County, Civ. No. 83-1026 (D. Idaho. filed June 11, 1985), the only case in which plaintiffs prevailed, an attorney fee award of $34,447 was granted to plaintiffs who successfully challenged the confinement policies and practices of county correctional officials to incarcerate juvenile offenders in jail with adult offenders. Defendants have prevailed in fourteen cases. No cases are pending.

Illinois

The Administrative Office of the Courts reported that fifty-three §1983 lawsuits have been filed against state judicial officers since 1982. Although attorney fees were requested in five cases, no attorney fee awards have been granted. One reported case was ruled in favor of the plaintiff. In Forrester v. White, 108 S. Ct. 538 (1988), plaintiff filed a damages action in federal district court alleging that she was demoted and discharged on account of her sex. The jury ruled in plaintiff's favor awarding her $81,819 in compensatory damages. The court, however, granted summary judgment to defendant judge on the ground that he was entitled to absolute immunity. The Court of Appeals affirmed. The U.S. Supreme Court reversed the lower courts' decisions and held that state court judges do not have absolute immunity from damage suits under §1983 for administrative (employment) actions. Defendants have prevailed in twenty-one cases. Thirty of the reported cases are pending. The types of cases filed against judges include: bribery of a judge; improper trial conduct; delayed court decisions; and overly expedited hearings.

Indiana

Chief Justice Randall T. Shepard reported that eighteen §1983 lawsuits have been filed against state court judges in Indiana. Eight suits were filed pro se. Requests for attorney fees were made in four cases, and attorney fees of $13,905 were awarded in Kurowski v. Krajewski, 848 F.2d 767 (7th Cir., 1988), the only case in which plaintiffs prevailed. In Kurowski, plaintiffs sued defendant judge for using political criteria to hire public defenders. Defendants have prevailed in six cases. Eleven cases are pending.

Iowa

Craig Kelinson, Special Assistant Attorney General, reported that seventeen §1983 lawsuits have been filed against state court judges. One request for attorney fees was made but not granted. Defendants have prevailed in twelve cases. Five cases are pending.

Kansas

The Office of the Attorney General reported that forty-four §1983 lawsuits have been filed against state court judges and fifteen against nonjudicial court officers. Two lawsuits were filed that did not provide information about the capacity in which the court defendants were sued. Attorney fees were requested in twenty-four cases and awarded to defendant judges in seven cases. The fees awarded ranged from $50 to $1,193. Plaintiffs have prevailed in seven cases. In one case, Everett v. Murray, No. 84-4205 (D. Kan. filed June 11, 1984), plaintiff, a juvenile, was placed in a hospital that was operated by an administrator who believed in homosexuality and electric shock to the genitals as treatment for juvenile delinquents. Plaintiff was abused and settled the case for $137,000. Five of the cases won by plaintiffs were brought against clerks and sheriffs. Defendants have prevailed in thirty-six cases. Eighteen cases are pending.

Kentucky

Kara W. Katakis, Chief Legal Counsel for the Kentucky Administrative Office of the Courts, reported that fifty-six §1983 lawsuits have been filed against state court judges and one against a court clerk. Although attorney fee requests were made in seventeen cases, no attorney fee awards have been granted. Plaintiffs in one case, Hammons v. Luker, No. 83-129 (E.D. Ky. filed May 13, 1983), were ordered to pay defendants' court costs. Plaintiff successfully sued a judge and prosecutor in one case, Howard v. Miller, C-84-0514-CA (W.D. Ky. filed May 2, 1984), for violating his civil rights during the course of his trial and settled the case for $7,500. Defendants have prevailed in thirty-nine cases. Sixteen cases are pending. The types of claims filed against judicial and nonjudicial officers include: unlawful arrests; illegal search and seizures; and improper criminal trial conduct and sentencing.

Louisiana

Timothy J. Palmatier, Deputy Judicial Administrator, reported that forty-six civil rights actions have been filed against state court judges. Although requests for attorney fees were made in two cases, no attorney fee awards have been granted. Plaintiffs have not prevailed in any case. Defendants have prevailed in 20 cases, and 25 cases are pending. The types of claims filed against judges include: disputed criminal case decisions; racial discrimination in sentencing; failing to provide trial transcripts; and clerical errors on docket sheets.

Maine

William R. Stokes, Assistant Attorney General, reported that eighteen lawsuits have been filed against state court judges and two against the state court administrator. Attorney fees were requested in five cases, and $9,647 was awarded to handicapped plaintiffs in Maine Association of Handicapped Persons v. State of Maine and Baggett, (CV 82-0367-P (D. Me. filed Nov. 29, 1982) who successfully sued the state court administrator to secure access by the handicapped to state courthouses. A consent decree was entered. Judgments favorable to defendants were entered in fifteen cases. Four cases are pending.

Maryland

James G. Klair of the Office of the Attorney General reported that seventy §1983 cases have been filed against state court judges and nine against nonjudicial court personnel. Although requests for the payment of attorney fees were made in nine cases, no attorney fee awards have been granted. Plaintiffs have prevailed in three cases. Two of these cases were settled. In the remaining case, Reigh v. Schleigh, 829 F.2d 1334 (4th Cir. 1985), the state filed a petition for a writ of certiorari to the U.S. Supreme Court contesting the award of attorney fees to plaintiffs. Judgments favorable to defendants were entered in sixty-four cases. Twelve cases are pending. The types of claims filed against judges include: unethical conduct of judges; improper award of custody;

unlawful arrest; obstructing justice; denial of due process; improper issuance of bench warrant; and improper pre-trial confinement.

Massachusetts

Christine P. Burak of the Massachusetts Supreme Judicial Court reported that six §1983 lawsuits have been filed against state court judges. Attorney fees were not requested in any case. Defendants have prevailed in three cases. Three cases are pending.

Michigan

James Covault of the Administrative Office of the Courts reported that sixty §1983 lawsuits have been filed against state court judges and one against a court sheriff. Requests for attorney fees were made in thirty cases, however, no attorney fee awards have been granted. Plaintiffs have not prevailed in any of the cases filed during the survey period. Judgments favorable to defendants have been entered in forty-five cases. Sixteen cases are pending. The types of claims filed against judges include: sex discrimination; false arrest and imprisonment; improper issuance of a bench warrant; conspiracy; improper discharge of employee; and abuse of judicial power.

Minnesota

Judith L. Rehak of the Administrative Office of the Courts reported that fifteen §1983 lawsuits have been filed against state court judges. Requests for attorney fees were made in five cases. No attorney fee requests have been awarded. Judgments or settlements in favor of defendants have been entered in twelve cases. Three cases are pending. The types of claims filed against judges include: wrongful discharge of employees; discrimination; and defamation.

Mississippi

Glenda Tomlinson of the Supreme Court of Mississippi reported that four §1983 lawsuits were filed against state court judges during the survey period. Although requests for attorney fees were made in two cases, no attorney fee awards have been granted. Plaintiffs have not prevailed in any case. Defendants have prevailed in three cases. One case is pending. The types of claims filed against judicial officers include: unconstitutional enforcement of statute requiring parental consent before minors may have an abortion; false imprisonment; discrimination; and a suit to open bar disciplinary hearings to the public.

Missouri

Missouri did not respond to the 1988 survey. Case information supplied by Bill L. Thompson of the Supreme Court of Missouri in 1986 revealed at that time that five §1983 lawsuits had been filed against state court judges and two against nonjudicial officers. Requests for attorney fees were made and granted in five cases. Plaintiffs prevailed and were awarded attorney fees of the following amounts in four of five cases: $17,972 in Goodwin v. St. Louis, 729 F.2d 541 (8th Cn.1984), a sex discrimination suit; $460 in Davis v. Charleston, S 84-283 C(D) (E.D. MO. filed March 28, 1986), a suit challenging the incarceration of individuals who failed to follow court orders to pay a fine without a probable cause hearing; $35,688 in R.W.T. v. Dalton, 712 F.2d 1225 (8th Cir. 1983), a suit that challenged the illegal detention of juveniles without probable cause hearings; and $13,900 in Barnes v. Bosley, 795 F.2d 501 (8th Cir. 1984), an employment discrimination and First Amendment case. Defendants prevailed and were awarded attorney fees of $15,563 in one case, Buford v. Tremayne, 747 F.2d 445 (8th Cir. 1984), a suit that involved a former state court judge suing the state supreme court for conspiring to remove him from office. Two cases are pending.

Montana

No survey response was received in 1985, 1986 or 1988.

Nebraska

Jill Gradwohl Schroeder, Assistant Attorney General, reported that between 1982 and 1987 thirteen §1983 lawsuits were filed against state court judges. Three of the cases were filed pro se. Seven §1983 lawsuits were filed in 1988 but are not included in this report's statistics because the cases are outside the survey period (1982-87). Requests by plaintiffs for attorney fees were made in two cases and awarded in one. In Wiseman v. Keller, CV 83-L-255 (D. Neb. filed 1983), three employees successfully sued two district court judges and three county court judges for dismissing them without due process. The employees were reinstated and their attorneys were awarded $18,121 in fees and $1,272 in court costs. Defendants prevailed in ten cases, and two cases are pending. The types of claims filed against Nebraska judges include: conspiracy; improper transfer of a detainee to a correctional facility; fraud; and deprivation of property and constitutional rights without due process of law.

New Jersey

Michael L. Barry, Administrative Office of the Courts, reported that fifty-five §1983 lawsuits have been filed against state court judges and three against nonjudicial court personnel. Ten cases were filed pro se. Although attorney fees were requested in three cases, no attorney fee awards have been granted. Plaintiffs have not prevailed in any case. Defendants have prevailed in fifty cases. Eight cases are pending.

New Hampshire

Thomas T. Barry, Administrative Office of the Courts, reported that thirty-six §1983 lawsuits have been filed against state court judges and five against nonjudicial court personnel. Requests for attorney fees were made in twelve cases and awarded in one case, Piper v. Supreme Court 470 U.S. 274 (1985). In Piper, plaintiff successfully challenged the residency requirement of the Bar. Defendants have prevailed in thirty-six cases. Four cases are pending. The types of claims filed against judges have include: denial of due process; failure to issue timely rulings; and equal protection violations.

New Mexico

Bert Allen of the Administrative Office of the Courts reported that case information on §1983 lawsuits filed against judicial officers was not available. Information provided in 1985, however, revealed that eleven civil rights actions were filed against state court judges. Requests for attorney fees were made in two of the cases and awarded to plaintiffs in one case, James v. Angel, Civ-83-1231-M (D. N. Mex. filed in 1983). In James, plaintiffs settled a sex discrimination suit and were awarded attorney fees of $75,000. Mr. Allen indicated in his 1988 response that the attorney fee award information submitted in 1985 in James appears to relate to the total award and not to the award of attorney fees. Defendants have prevailed in two cases. Eight cases are pending. The types of claims filed against judges include: denial of due process; defamation; religious discrimination; and sex discrimination.

New York

Howard L. Zwickel and James McSparron of the New York Department of Law reported that one hundred and eighty nine §1983 lawsuits were filed against state court judges between 1982 and 1987. Attorney fees were requested in twenty-five cases and awarded to a defendant in one case for the frivolous nature of plaintiff's lawsuit. Plaintiffs have prevailed in three cases, two of which were described as settled. Defendants have prevailed in one hundred and nine cases. Seventy-six cases are pending. The types of claims filed against state court judges include: refusal to assign counsel of choice as defense; criminal trial delay; equal protection violation; inappropriate judicial comments; denial of due process; false arrest; and dissolution of a corporation.

Nevada

William E. Isaeff, Chief Deputy Attorney General, reported that one case has been filed against a state judicial officer. The plaintiff requested the payment of attorney fees, and the case is presently on appeal.

North Carolina

Thomas J. Andrews of the Administrative Office of the Courts provided case information on thirty-three suits filed against state court judges and nineteen suits filed against nonjudicial court personnel. Requests for attorney fees were made in twelve cases and awarded to plaintiff in one case, Stephans v. Thompson, 83-6-CIV-7 (E.D. N.C. filed Jan. 7, 1983), the only case in which plaintiff prevailed. In Stephans, plaintiff successfully challenged her employment termination by the county clerk and settled the case. Although Robert E. Giles, Director of Research and Planning, reported in 1985 that plaintiffs prevailed in three cases, no information for the two additional cases was provided; therefore, these two cases are not included in this report's statistics. Judgments or settlements favorable to defendants were entered in twenty-eight cases. Twenty-three cases are presently pending. The types of claims filed against judicial officers include: denial of due process; inequitable distribution of marital property; child custody; conspiracy; failure of clerk to issue a civil summons; incarceration without speedy trial; and failing to provide detainee with medical care.

North Dakota

William G. Bohn, State Court Administrator, reported that thirty §1983 lawsuits have been filed against state court judges and one against a nonjudicial court officer. Although plaintiffs requested the payment of attorney fees in eight cases, no attorney fee awards have been granted. Defendants, however, were awarded attorney fees in nine cases because of the frivolous nature of plaintiffs' lawsuits. These awards have ranged from $500 to $750 per case. Plaintiffs have not prevailed in any case. Judgments favorable to defendants have been entered in twenty-eight cases. Three cases are pending.

Ohio

Stephan W. Stover, Administrative Director of the Supreme Court of Ohio, provided information on the number of 42 U.S.C. §1983 lawsuits filed against judges since June 1986, as indicated by Herbert L. Jamison & Company, the carrier of the Ohio State Judges' professional liability policy. The insurance company reported that since June 1986 fifty-four §1983 lawsuits have been filed against state court judges. Thirty-two cases have been closed with no payment, and twenty-two cases are currently open.

Oklahoma

Howard W. Conyers, Director, Administrator Office of the Courts, reported that two §1983 lawsuits were filed against state court judges during the survey period. Mr. Conyers also reported that three §1983 cases were filed against state court judges in 1988. The 1988 cases are not included in this reports' statistics. There have been no attorney fees requests. All cases are pending.

Oregon

Linda Zuckerman, Legal Counsel for the Judicial Department, reported that thirty-nine lawsuits have been filed against state court judges and one against a clerk. Eighteen cases were filed pro se. Requests for attorney fees were made in eleven cases and awarded in two cases. In

Fitch v. Linden, No. 83-991-PA (D. Or. filed June 18, 1983), plaintiff successfully challenged a state statute regarding recoupment of the cost of defending acquitted indigent defendants and was awarded $35,000 in attorney fees. In addition to Fitch v. Linden, plaintiff in Fuller v. Oregon, No. A8504-02609 (Or. Cir. Ct. filed 1985), sued the state for false arrest and settled the case for $1,000. Judgments favorable to defendants were entered in thirty cases. Defendants were awarded $1,614 in Dalebout v. Rust, No. 86-6012 ME (D. Or. filed Jan. 14, 1986), because of the frivolous nature of plaintiff's lawsuit. Eight cases are pending. The types of claims filed against judges include: wrongful foreclosure; racial discrimination; wrongful eviction; false arrest; and wrongful suspension of driver's license' denial of due process.

Pennsylvania

Howard W. Abramson, Deputy Legal Counsel to the State Court Administrator, reported that three hundred and eighty-one §1983 lawsuits were filed against state court judges and fourteen against clerks or court administrators between 1982 and 1987. Although the case information provided reveals that only two requests for attorney fees were made, Mr. Abramson indicated that virtually all the complaints request attorney fees. In Gagliardi v. Passio, CA84-4537 (D. Pa), plaintiff settled a wrongful employee discharge suit, which included $30,000 in attorney fees. In Hammock v Petit, CA 83-6080 (D. Pa), an equity and damage suit was brought against a clerk for his failure to reduce the probability that improper judgments would be entered once he became aware of systemic error. The case was settled, which included $30,000 in attorney fees. In addition to these two cases, one other case was settled in plaintiff's favor. Mr. Abramson states that there have been additional case rulings favorable to plaintiffs. Since 1980, an estimated $299,000 have been paid out in attorney fees in civil rights lawsuits filed against judges, clerks and court administrators. He states: "There is no doubt that _Pulliam_ and _Forrester v. White_ will stimulate lawsuits because of the availability of attorneys fees." Judgments favorable to defendants have been entered in seventy-three cases. Three hundred and ninteen cases are pending.

Puerto Rico

No new case information regarding §1983 litigation against judges was received in 1986 and 1988. The Administrative Office of the Courts in 1985 reported that four §1983 cases were filed against state judicial officers between 1982 and 1985. One suit was filed in 1982, another in 1983, and two suits were filed in 1984. Although attorney fees were requested in three cases, no fees have been awarded. Claims against judges in three cases have been dismissed in favor of defendant judges. One case is pending.

Rhode Island

Robert C. Harvall, Rhode Island Supreme Court, reported that no §1983 lawsuits have been filed against state court judicial and nonjudicial officers.

South Carolina

Motte L. Talley of the Administrative Office of the Courts reported that three lawsuits have been filed against state court judges. Requests for the payment of attorneys fees were made in two cases, however, no attorney fee awards have been made to date. All three suits concerned administrative matters: bar admissions and disciplining attorneys. Judgment in one case was entered in favor of defendant. Two cases are pending.

South Dakota

No new case information was reported in 1986 and 1988. The Administrative Office of the Courts in 1985 reported that six §1983 lawsuits have been filed against state court judges since 1982. One case was filed against a judge in 1982, and five cases were filed in 1984. Attorney fees were not requested in any of the reported cases, and judgments in five cases were favorable to defendant judges. One case is pending.

Tennessee

John Knox Walkup, Chief Deputy Attorney General, reported that thirteen §1983 lawsuits have been filed against state court judges. Request for attorney fees were made in two cases, however, no attorney fee awards have been granted. Plaintiffs have not prevailed in any case. Defendants have prevailed in nine cases. Four cases are pending. The types of claims filed against judges include: unlawful arrest and imprisonment; defamation; divorce and custody disputes; and no access to court.

Texas

William L. Willis of the Supreme Court of Texas reported that thirty-three §1983 lawsuits were filed against state court judges between 1982 and 1987. Although attorney fees were requested in sixteen cases, no attorney fee awards have been granted. Plaintiffs have prevailed in one case, De la Garza v. Cameron County, No. 8-83 307 (S.D. Tex. filed May, 1983). Judgments favorable to defendants have been entered in ten cases. Twenty-two cases are pending.

Utah

Carlie Christensen of the Administrative Office of the Courts provided information on nineteen suits filed against judges and three suits filed against nonjudicial court personnel. Although attorney fees were requested in all twenty-two cases, no attorney fee awards have been granted to date. Plaintiffs have prevailed in two cases. In D.J.R. v. Larsen (D. Utah. filed Aug. 8, 1982), plaintiffs settled the case for $48,000. In Blake v. Nichols, (C. D. Utah. filed 1985), plaintiffs successfully challenged the garnishment rules and procedures followed by the clerk's office in issuing garnishment forms. Judgments favorable to defendants have been entered in fourteen cases. Six cases are pending. The types of claims filed against judicial officers include: denial of due process; false imprisonment; child custody; and conspiracy.

Vermont

Thomas J. Lehner of the Supreme Court reported that no §1983 lawsuits were filed against state court judges in 1985, 1986 and 1988.

Virgin Islands

No new case information was reported in 1988. Viola E. Smith, the Administrator of the Court, reported in 1986 that four §1983 lawsuits have been filed against state court judges since 1982. Two cases were filed in 1982, one in 1985 and one in 1986. Attorney fees were requested in one case. Judgments favorable to defendant judges have been entered in two cases. Two cases are still pending.

Virginia

Robert N. Baldwin of the Supreme Court of Virginia reported that seventy-seven lawsuits have been filed against state court judges and ten against court personnel. Attorney fees were requested in twenty-three cases and awarded to plaintiffs in three cases. Plaintiffs prevailed in five cases. Judgments or settlements were entered for the defendants in sixty-three cases. Eighteen cases are pending. The types of claims filed against judicial and nonjudicial officers include: illegal incarceration; conspiracy; civil rights violations; denial of due process; unlawful arrest, search and seizure; unlawful detention; no right to counsel; and lack of court jurisdiction.

Washington

Vernon R. Pearson, Chief Justice of the Supreme Court of Washington, reported that there has been one §1983 lawsuit filed against a state court judge. In Sellers v. Dolliver, No. C85-2340R (W. D. Wash. filed Nov. 14, 1985), plaintiffs, acting *pro se*, sued Chief Justice James Dolliver for removing his pending action from the court calendar. Attorney fees were requested. The district court dismissed Justice Dolliver from the suit. An appeal of the dismissal is pending in the 9th Circuit.

West Virginia

No survey response was received.

Wisconsin

James H. McDermott of the Office of Attorney General reported that twenty-one lawsuits have been filed against state court judges. Attorney fees were requested in six cases and awarded to defendants in three cases because of the frivolous nature of the lawsuits. Defendants were awarded

$1,710 in one case and $1,268 in another. Information about the amount of attorney fees awarded in the third case was not provided. Defendants have prevailed in eighteen cases. Plaintiffs have not had a favorable ruling. Three cases are pending.

Wyoming

Chief Justice Richard V. Thomas in 1985 reported that three judges were sued in 1983 and that each case was dismissed. Robert L. Duncan of the Supreme Court of Wyoming reported in 1988 that there has been no litigation involving judges or nonjudicial officers in the state since 1983.

II. Statistical Information on the Volume of 42 U.S.C. §1983 Litigation Filed Against State Judicial Officers and Court Personnel.

A. Number of 42 U.S.C. §1983 Lawsuits Filed Against State Judicial Officers and Court Personnel - Summary Findings. The reported number of §1983 lawsuits filed against judicial and nonjudicial personnel (judges, hearing officers, justices of the peace, and magistrates, as well as clerks, administrators, sheriffs and probation officers) in each state between 1982 and 1987 is displayed in table 1. In some instances, respondents reported that the exact nature of the claim and the basis for relief in some of the lawsuits were not always clearly stated in the complaint. For the most part, these vaquely worded claims have been included in this survey as implied §1983 suits if they appeared to allege constitutional and civil rights violations.

Survey findings indicate that litigation under §1983 increased annually from 1982 to 1984 (see table 1 and chart A). Between 1982 and 1983, the total number of reported lawsuits filed against judicial officers and court personnel increased from 198 to 286, or 44.5%. From 1983 to 1984, the filings increased 51.5%, from 286 to 433. Between 1984 and 1985, the number of reported lawsuits decreased from 433 to 281, a 35% reduction. Filings increased again between 1985 and 1986 by 49% (281 to 418) but decreased again by 14.3% between 1986 and 1987 (418 to 358).

TABLE 1

Number of 42 U.S.C. §1983 Cases Filed Against State Judicial Officers and Court Personnel

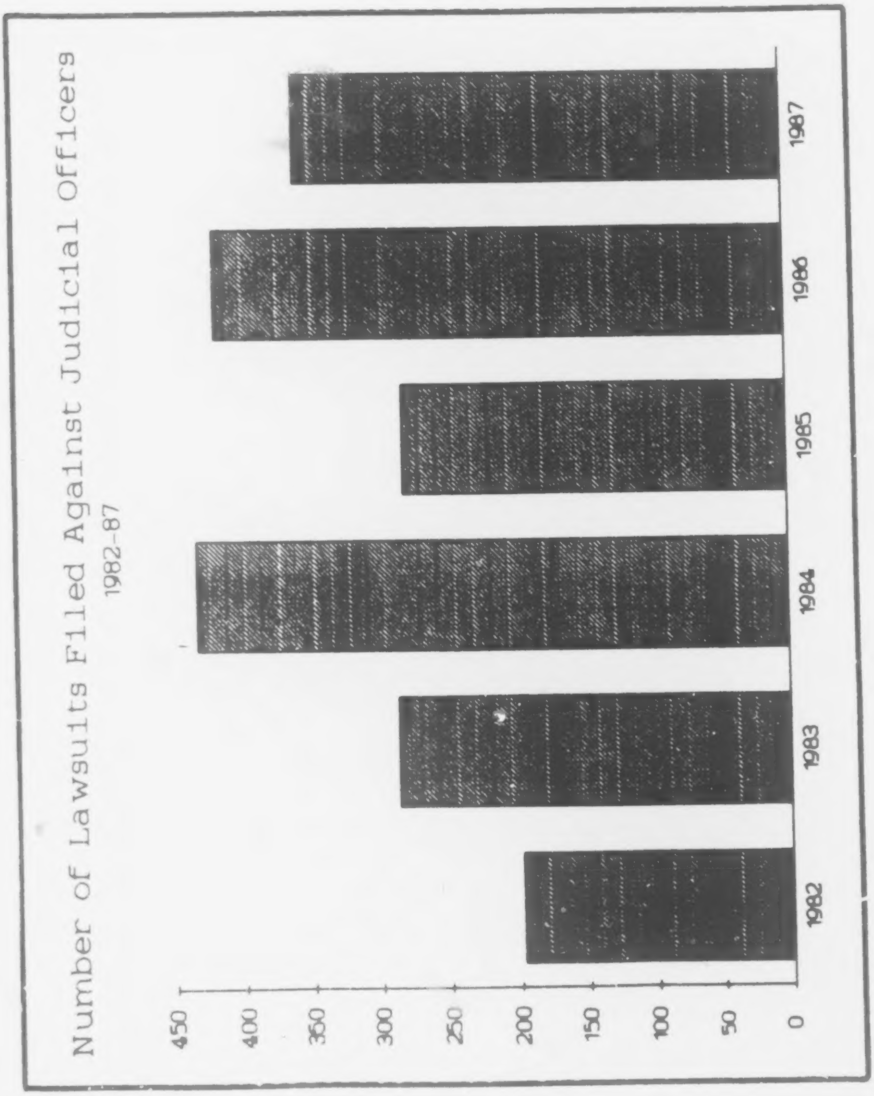
STATES	1982	1983	1984	1985	1986	1987	TOTAL
ALABAMA	2	1	1	3	2	11	20
ALASKA	0	1	2	1	3	0	7
ARIZONA	1	0	0	1	2	0	4
ARKANSAS	0	0	0	0	0	0	0
CALIFORNIA	14	6	12	16	7	15	70
COLORADO	7	16	29	24	22	27	125
CONNECTICUT	0	0	0	3	2	1	6
DELAWARE	0	2	6	0	1	10	19
DIST. OF COLUMBIA	1	2	1	1	2	3	10
FLORIDA	11	13	18	13	20	13	88
GEORGIA	16	8	17	6	12	5	64
HAWAII	4	3	3	5	3	NR	18
IDAHO	1	4	7	1	1	1	15
ILLINOIS	5	6	9	7	16	10	53
INDIANA	2	2	4	4	3	3	18
IOWA	0	1	8	2	3	3	17
KANSAS	4	28	22	6	1	0	61
KENTUCKY	4	9	8	15	10	11	57
LOUISIANA	5	4	12	2	2	21	46
MAINE	1	7	5	3	1	3	20
MARYLAND	3	11	18	23	8	16	79
MASSACHUSETTS	0	0	2	1	1	2	6
MICHIGAN	9	6	7	11	19	9	61
MINNESOTA	1	3	4	1	2	4	15
MISSISSIPPI	0	0	1	2	1	0	4
MISSOURI	0	3	3	0	1	NR	7
MONTANA	NR	NR	NR	NR	NR	NR	NR
NEBRASKA	0	3	7	1	1	1	13
NEVADA	0	0	0	0	0	1	1
NEW HAMPSHIRE	5	12	6	7	7	4	41
NEW JERSEY	9	13	19	8	5	4	58
NEW MEXICO	2	2	5	2	0	0	11
NEW YORK	17	47	86	20	4	15	189
NORTH CAROLINA	7	5	13	4	2	21	52
NORTH DAKOTA	0	1	5	18	4	3	31
OHIO	0	0	0	0	54	0	54
OKLAHOMA	0	0	0	1	0	1	2
OREGON	0	1	4	19	10	6	40
PENNSYLVANIA	52	45	40	17	152	89	395
PUERTO RICO	1	1	2	0	0	0	4
RHODE ISLAND	0	0	0	0	0	0	0
SOUTH CAROLINA	0	0	1	1	0	1	3
SOUTH DAKOTA	1	0	5	0	NR	NR	6
TENNESSESE	0	0	0	2	4	7	13

TABLE 1 (continued)

Number of 42 U.S.C. §1983 Cases Filed
Against State Judicial Officers and Court Personnel

STATES	1982	1983	1984	1985	1986	1987	TOTAL
TEXAS	1	4	7	5	3	13	33
UTAH	1	1	4	7	2	7	22
VERMONT	0	0	0	0	0	0	0
VIRGINIA	6	10	25	15	19	12	87
WASHINGTON	0	0	0	1	0	0	1
WEST VIRGINIA	NR	NR	NR	NR	NR	NR	NR
WISCONSIN	3	2	5	1	5	5	21
WYOMING	0	3	0	0	0	0	3
GUAM	0	0	0	0	0	NR	0
VIRGIN ISLANDS	2	0	0	1	1	NR	4
AMERICAN SAMOA	0	0	0	0	NR	NR	0
TOTAL	198	286	433	281	418	358	1974

NR = No Survey Response for Year



Number of Lawsuits Filed Against Judicial Officers
1982-87

CHART A

B. Capacity in which Judicial Officers Are Sued: Judicial or Administrative - Summary of Findings.

A major concern of the Task Force has been whether it can be determined in which capacity --judicial/adjudicative or administrative-- judicial officers are more often sued. The cases have been subtotaled, segregating for this analysis those cases that involved claims against judicial officers as opposed to claims against clerks and administrators.

As illustrated in table 2, 6.75% of the 1,813 lawsuits that are filed against judicial officers involve disputes arising from administrative acts. This category includes such activities as selection and termination of employees, access to records and facilities of the court, and supervision of the bar with regard to entrance requirements, examinations and advertising regulations. The statistics reveal that 55.6% of the total number of suits brought against judicial officers involve disputed actions undertaken in the adjudicative or traditional judicial role, and 37.65% of the cases were not described in sufficient detail and are categorized as "unknown capacity."

TABLE 2

Capacity in Which Judicial Officers are Sued: Judicial or Administrative

	Total Cases Reported	Cases with Judges, Magistrates and Hearing Officers as Defendants	SUED IN WHAT CAPACITY?		
			Judicial	Administrative	Unknown
ALABAMA	20	17	12	5	0
ALASKA	7	7	7	0	0
ARIZONA	4	4	2	0	2
ARKANSAS	0	0	0	0	0
CALIFORNIA	70	67	45	5	17
COLORADO	125	120	70	13	37
CONNECTICUT	6	5	5	0	0
DELAWARE	19	19	18	1	0
DIST. OF COLUMBIA	10	7	6	1	0
FLORIDA	88	85	41	2	42
GEORGIA	64	64	54	9	1
HAWAII	18	18	16	2	0
IDAHO	15	15	7	2	6
ILLINOIS	53	53	20	4	29
INDIANA	18	18	15	3	0
IOWA	17	16	11	1	4
KANSAS	61	44	35	3	6
KENTUCKY	57	56	40	3	13
LOUISIANA	46	46	37	1	8
MAINE	20	18	14	2	2
MARYLAND	79	70	53	3	14
MASSACHUSETTS	6	6	4	0	2
MICHIGAN	61	60	28	1	31
MINNESOTA	15	15	13	2	0
MISSISSIPPI	4	4	3	1	0
MISSOURI	7	5	4	1	0
MONTANA	NR	NR	NR	NR	NR
NEBRASKA	13	13	11	2	0
NEVADA	1	1	1	0	0
NEW HAMPSHIRE	41	36	28	1	7
NEW JERSEY	58	55	12	0	43
NEW MEXICO	11	11	11	0	0
NEW YORK	189	189	77	28	84
NORTH CAROLINA	52	33	18	1	14
NORTH DAKOTA	31	30	26	0	4
OHIO	54	?	?	?	?
OKLAHOMA	2	2	2	0	0
OREGON	40	39	33	2	4
PENNSYLVANIA	395	381	92	13	276

TABLE 2 (continued)

Capacity in Which Judicial Officers are Sued: Judicial or Administrative

	Total Cases Reported	Cases with Judges, Magistrates and Hearing Officers as Defendants	SUED IN WHAT CAPACITY?		
			Judicial	Administrative	Unknown
PUERTO RICO	4	4	0	0	4
RHODE ISLAND	0	0	0	0	0
SOUTH CAROLINA	3	3	0	3	0
SOUTH DAKOTA	6	6	0	0	6
TENNESSEE	13	13	13	0	0
TEXAS	33	33	23	0	10
UTAH	22	19	17	2	0
VERMONT	0	0	0	0	0
VIRGINIA	87	77	63	4	10
WASHINGTON	1	1	1	0	0
WEST VIRGINIA	NR	NR	NR	NR	NR
WISCONSIN	21	21	20	1	0
WYOMING	3	3	0	0	3
GUAM	0	0	0	0	0
VIRGIN ISLANDS	4	4	0	0	4
AMERICAN SAMOA	0	0	0	0	0
TOTAL	1,974	1,813	1,008	122	683
Percentage of Total			55.6%	6.75%	37.65%

NR = No Survey Response

C. Disposition of Cases on the Merits of The Claim - Summary of Findings

Fifty-five percent of the known case dispositions are in favor of defendants Only 2.4% of the cases involve decisions or settlements favorable to plaintiffs. Of the cases reported, 42.3% are pending at the pretrial stage (see table 3). Cases filed within the last two years were listed as pending if no information was given about their disposition or status. No case status information was available for seven cases.

Twenty-three states and the District of Columbia reported that of the 1974 cases, decisions or settlements favorable to plaintiffs were made in 47 cases. Twenty-two of these successful lawsuits, or 47%, involved complaints against acts that can be characterized as judicial in nature.

TABLE 3

Disposition of Cases on the
Merits of the Claim

CASE STATUS

	Total Cases Reported	Judgment or Settlement favorable to Plaintiff(s)	Dismissal or other judgment favorable to Defendants(s)	Pending (prehearing stage, awaiting trial)
ALABAMA	20	1	12	7
ALASKA	7	0	4	3
ARIZONA	4	0	3	1
ARKANSAS	0	0	0	0
CALIFORNIA	70	2	39	29
COLORADO	125*	2	85	37
CONNECTICUT	6	0	4	2
DELAWARE	19	1	13	5
DIST. OF COLUMBIA	10	1	6	3
FLORIDA	88*	0	35	52
GEORGIA	64	1	55	8
HAWAII	18	0	12	6
IDAHO	15	1	14	0
ILLINOIS	53*	1	21	30
INDIANA	18	1	6	11
IOWA	17	0	12	5
KANSAS	61	7	36	18
KENTUCKY	57*	1	39	16
LOUISIANA	46*	0	20	25
MAINE	20	1	15	4
MARYLAND	79	3	64	12
MASSACHUSETTS	6	0	3	3
MICHIGAN	61	0	45	16
MINNESOTA	15	0	12	3
MISSISSIPPI	4	0	3	1
MISSOURI	7	4	1	2
MONTANA	NR	NR	NR	NR
NEBRASKA	13	1	10	2
NEVADA	1	0	0	1
NEW HAMPSHIRE	41	1	36	4
NEW JERSEY	58	0	50	8
NEW MEXICO	11	1	2	8
NEW YORK	189*	3	109	76
NORTH CAROLINA	52	1	28	23
NORTH DAKOTA	31	0	28	3
OHIO	54	0	32	22
OKLAHOMA	2	0	0	2
OREGON	40	2	30	8
PENNSYLVANIA	395	3	73	319

TABLE 3 (continued)

Disposition of Cases on the Merits of the Claim

CASE STATUS

	Total Cases Reported	Judgment or Settlement favorable to Plaintiff(s)	Dismissal or other judgment favorable to Defendants(s)	Pending (prehearing stage, awaiting trial)
PUERTO RICO	4	0	3	1
RHODE ISLAND	0	0	0	0
SOUTH CAROLINA	3	0	1	2
SOUTH DAKOTA	6	0	5	1
TENNESSEE	13	0	9	4
TEXAS	33	1	10	22
UTAH	22	2	14	6
VERMONT	0	0	0	0
VIRGINIA	87*	5	63	18
WASHINGTON	1	0	0	1
WEST VIRGINIA	NR	NR	NR	NR
WISCONSIN	21	0	18	3
WYOMING	3	0	3	0
GUAM	0	0	0	0
VIRGIN ISLANDS	4	0	2	2
AMERICAN SAMOA	0	0	0	0
TOTAL	1974	47	1085	835
PERCENTAGE OF TOTAL		2.4%	55%	42.3%

Legend:

NR No response

* Case status information for each reported lawsuit not available.

D. Attorney Fee Awards to Plaintiff(s) - Summary Findings. Requests for attorney fees were reportedly made in 383 or 19% of the total reported cases (see table 4). Successful plaintiffs were awarded attorney fees in 18 of 47 reported cases, or 39%. Some cases were settled for a lump sum without specifically designating attorney fees.

As shown in Chart B, the number of requests for attorney fees increased slightly each year from 1982 to 1984. Requests for attorney fees decreased between 1985 and 1986, but increased again from 1986 and 1987. Table 4(a) provides information on the number of requests for attorney fees made in each state between the years 1982 and 1987.

TABLE 4

Attorney Fee Awards to Plaintiffs

	Total Cases Reported	Cases in Which Attorney Fees Requested	Cases with Judgments or Settlements Favorable to Plaintiff(s)	Cases in which Attorney Fees Awarded to Plaintiffs
ALABAMA	20	7	1	1
ALASKA	7	2	0	0
ARIZONA	4	0	0	0
ARKANSAS	0	0	0	0
CALIFORNIA	70	33	2	0
COLORADO	125	24	2	1
CONNECTICUT	6	5	0	0
DELAWARE	19	4	1	0
DIST. OF COLUMBIA	10	3	1	0
FLORIDA	88	6	0	0
GEORGIA	64	18	1	1
HAWAII	18	6	0	0
IDAHO	15	12	1	1
ILLINOIS	53	5	1	0
INDIANA	18	4	1	1
IOWA	17	1	0	0
KANSAS	61	24	7	0
KENTUCKY	57	17	1	0
LOUISIANA	46	2	0	0
MAINE	20	5	1	1
MARYLAND	79	9	3	0
MASSACHUSETTS	6	0	0	0
MICHIGAN	61	30	0	0
MINNESOTA	15	5	0	0
MISSISSIPPI	4	2	0	0
MISSOURI	7	5	4	4
MONTANA	NR	NR	NR	NR
NEBRASKA	13	2	1	1
NEVADA	1	1	0	0
NEW HAMPSHIRE	41	12	1	0
NEW JERSEY	58	3	0	0
NEW MEXICO	11	2	1	1
NEW YORK	189	25	3	0
NORTH CAROLINA	52	12	1	1
NORTH DAKOTA	31	8	0	0
OHIO	54	?	0	0
OKLAHOMA	2	0	0	0
OREGON	40	11	2	1
PENNSYLVANIA	395	2*	3	2
PUERTO RICO	4	3	0	0
RHODE ISLAND	0	0	0	0
SOUTH CAROLINA	3	2	0	0
SOUTH DAKOTA	6	0	0	0
TENNESSEE	13	2	0	0

TABLE 4 (continued)

Attorney Fee Awards to Plaintiffs

	Total Cases Reported	Cases in Which Attorney Fees Requested	Cases with Judgments or Settlements Favorable to Plaintiff(s)	Cases in which Attorney Fees Awarded to Plaintiffs
TEXAS	33	16	1	0
UTAH	22	22	2	0
VERMONT	0	0	0	0
VIRGINIA	87	23	5	3
WASHINGTON	1	1	0	0
WEST VIRGINIA	NR	NR	NR	NR
WISCONSIN	21	6	0	0
WYOMING	3	0	0	0
GUAM	0	0	0	0
VIRGIN ISLANDS	4	1	0	0
AMERICAN SAMOA	0	0	0	0
TOTAL	1974	383	47	18
PERCENTAGE OF TOTAL		19%		39% of cases in which prevailed; .09% of total cases

Legend:

NR No response

-- No reported cases

*Although case information provided indicated that attorney fee requests were made in two cases, the deputy legal counsel who responded to the survey stated that requests for attorney fees are made in virtually all cases.

TABLE 4A

Number of Requests for Attorney Fees By Year

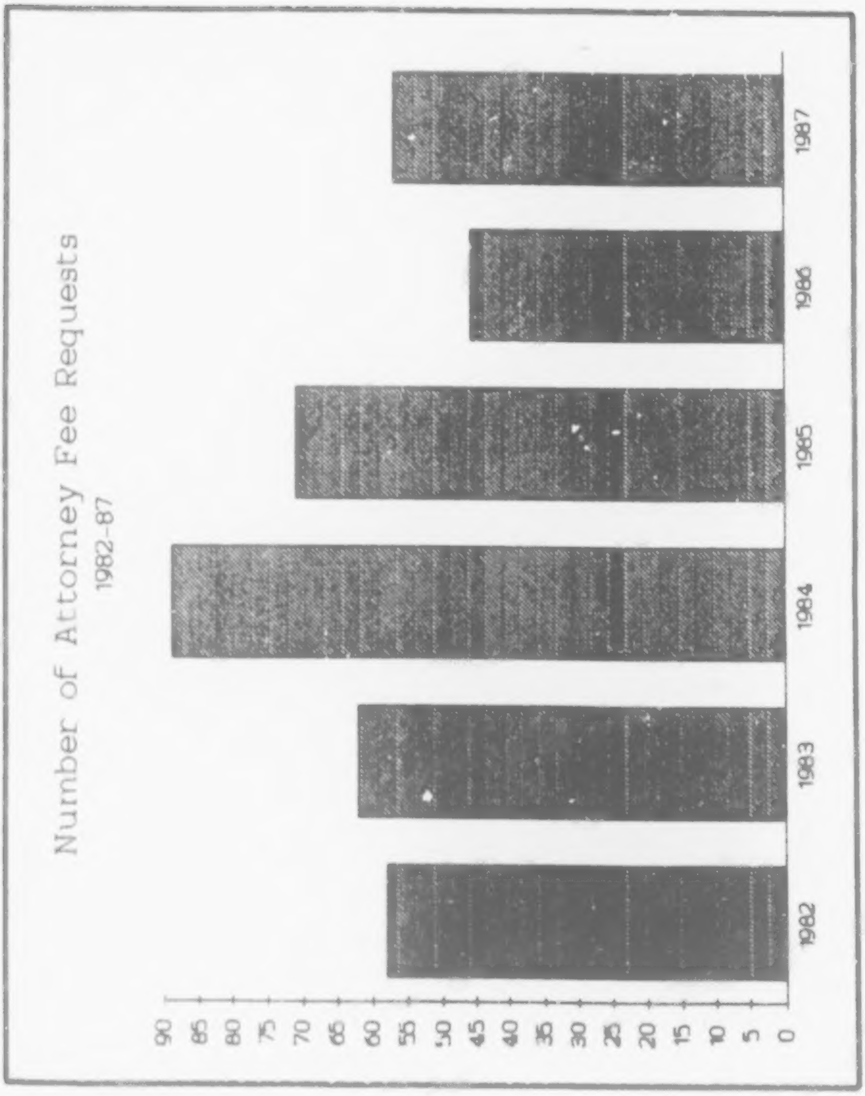
STATES	1982	1983	1984	1985	1986	1987	TOTAL CASES WITH REQUESTS
ALABAMA	2	1	1	1	1	1	7
ALASKA	0	0	1	1	0	0	2
ARIZONA	0	0	0	0	0	0	0
ARKANSAS	0	0	0	0	0	0	0
CALIFORNIA	14	2	1	8	1	7	33
COLORADO	2	4	8	2	1	7	24
CONNECTICUT	0	0	0	3	1	1	5
DELAWARE	0	0	2	0	1	1	4
DIST. OF COLUMBIA	1	2	0	0	0	0	3
FLORIDA	0	2	1	2	1	0	6
GEORGIA	9	2	4	1	1	1	18
HAWAII	0	0	0	3	3	NR	6
IDAHO	1	3	5	1	1	1	12
ILLINOIS	1	1	0	2	1	0	5
INDIANA	1	0	1	0	2	0	4
IOWA	0	0	0	0	0	1	1
KANSAS	0	12	11	0	1	0	24
KENTUCKY	2	1	3	8	3	0	17
LOUISIANA	0	1	1	0	0	0	2
MAINE	1	1	2	0	0	1	5
MARYLAND	0	1	1	2	2	3	9
MASSACHUSETTS	0	0	0	0	0	0	0
MICHIGAN	9	4	7	5	5	0	30
MINNESOTA	0	0	1	1	1	2	5
MISSISSIPPI	0	0	0	1	1	0	2
MISSOURI	0	3	1	1	0	NR	5
MONTANA	NR	NR	NR	NR	NR	NR	NR
NEBRASKA	0	1	1	0	0	0	2
NEVADA	0	0	0	0	0	1	1
NEW HAMPSHIRE	3	2	0	0	3	4	12
NEW JERSEY	0	1	2	0	0	0	3
NEW MEXICO	0	1	0	1	0	0	2
NEW YORK	6	5	7	4	1	2	25
NORTH CAROLINA	3	1	4	3	0	1	12
NORTH DAKOTA	0	0	2	3	1	2	8
OHIO	0	0	0	0	0	0	0
OKLAHOMA	0	0	0	0	0	0	0
OREGON	0	1	1	6	3	0	11
PENNSYLVANIA	0	1	1	0	0	0	2
PUERTO RICO	0	1	2	0	0	0	3
RHODE ISLAND	0	0	0	0	0	0	0
SOUTH CAROLINA	0	0	1	0	0	1	2
SOUTH DAKOTA	0	0	0	0	NR	NR	0
TENNESSEE	0	0	0	0	1	1	2

TABLE 4A (continued)

Number of Requests for Attorney Fees By Year

STATES	1982	1983	1984	1985	1986	1987	TOTAL CASES WITH REQUESTS
TEXAS	1	4	6	0	0	5	16
UTAH	1	1	4	7	2	7	22
VERMONT	0	0	0	0	0	0	0
VIRGINIA	0	2	6	3	6	6	23
WASHINGTON	0	0	0	1	0	0	1
WEST VIRGINIA	NR	NR	NR	NR	NR	NR	NR
WISCONSIN	1	1	1	1	1	1	6
WYOMING	0	0	0	0	0	0	0
GUAM	0	0	0	0	0	NR	0
VIRGIN ISLANDS	0	0	0	0	1	NR	1
AMERICAN SAMOA	0	0	0	0	NR	NR	0
TOTAL	58	62	89	71	46	57	383

NR = No Survey Response for Year



Number of Attorney Fee Requests
1982-87

CHART II

E. Attorney Fee Awards to Defendants - Summary of Findings. As illustrated in table 5, defendants have prevailed in 55% of the reported cases. In addition, defendants have been awarded attorney fee costs or other penalties for the frivolous nature of the claims filed against them under the Civil Rights Attorney Fee Awards Act or under Federal Civil Procedure Rule 11 in only 2.5% of the reported cases in which they prevailed.

TABLE 5

Attorney Fee Awards to Defendants

	Total Cases Reported	Cases with Outcomes Favorable to Defendant(s)	Cases with Attorney Fees, Costs or Penalties Awarded to Defendant
ALABAMA	20	12	0
ALASKA	7	4	0
ARIZONA	4	3	0
ARKANSAS	0	0	0
CALIFORNIA	70	39	0
COLORADO	125	85	2
CONNECTICUT	6	4	0
DELAWARE	19	13	2
DIST. OF COLUMBIA	10	6	0
FLORIDA	88	35	0
GEORGIA	64	55	1
HAWAII	18	12	0
IDAHO	15	14	1
ILLINOIS	53	21	0
INDIANA	18	6	0
IOWA	17	12	0
KANSAS	61	36	7
KENTUCKY	57	39	0
LOUISIANA	46	20	0
MAINE	20	15	0
MARYLAND	79	64	0
MASSACHUSETTS	6	3	0
MICHIGAN	61	45	0
MINNESOTA	15	12	0
MISSISSIPPI	4	3	0
MISSOURI	7	1	1
MONTANA	NR	NR	NR
NEBRASKA	13	10	0
NEVADA	1	0	0
NEW HAMPSHIRE	41	36	0
NEW JERSEY	58	50	0
NEW MEXICO	11	2	0
NEW YORK	189	109	1
NORTH CAROLINA	52	28	0
NORTH DAKOTA	31	28	9
OHIO	54	32	0
OKLAHOMA	2	0	0
OREGON	40	30	1
PENNSYLVANIA	395	73	0
PUERTO RICO	4	3	0
RHODE ISLAND	0	0	0
SOUTH CAROLINA	3	1	0
SOUTH DAKOTA	6	5	0
TENNESSEE	13	9	0

TABLE 5 (continued)

Attorney Fee Awards to Defendants

	Total Cases Reported	Cases with Outcomes Favorable to Defendant(s)	Cases with Attorney Fees, Costs or Penalties Awarded to Defendant
TEXAS	33	10	0
UTAH	22	14	0
VERMONT	0	0	0
VIRGINIA	87	63	0
WASHINGTON	1	0	0
WEST VIRGINIA	NR	NR	NR
WISCONSIN	21	18	3
WYOMING	3	3	0
GUAM	0	0	0
VIRGIN ISLANDS	4	2	0
AMERICAN SAMOA	0	0	0
TOTAL	1974	1085	28
PERCENTAGE OF TOTAL		55%	1% of total or 2.5% of cases in which they prevailed

Conclusions

Between 1982 and 1984, the number of lawsuits filed against judicial officers increased annually, peaking in 1984 during the year the United States Supreme Court decided Pulliam v. Allen. Although the volume of lawsuits filed against judicial officers decreased from 1984 to 1985, the number of 42 U.S.C. §1983 actions filed against state court judges increased in 1986 and remains at a level today that causes great concern to the judiciary.

As stated in the 1985 report, a large number of §1983 lawsuits filed against judicial officers are brought by disgruntled litigants who are not satisfied with judicial rulings in previous lawsuits. Few §1983 cases are decided or settled favorably for plaintiffs. We estimate that plaintiffs have received attorney fees in 39% of the cases in which they "prevailed," either at trial or by settlement for a figure that usually took into account and represented the cost of legal representation.

Pennsylvania continues to be the state with the largest number of claims filed against judges (395). According to Mr. Howland Abramson, Deputy Legal Counsel to the State Court Administrator, virtually all complaints filed against judges claim civil rights violations and request payment of attorney fees. While many of the cases are resolved on judicial immunity grounds, a significant number are not subject to summary dismissal. A smaller number of cases involve state statutes challenged in equity suits where the only state actor is the judge.

Finally, although most of the §1983 lawsuits filed against judicial officers are for actions committed within their adjudicative roles, the more successful challenges concern administrative or nonadjudicative conduct.

ENDNOTES

[1] 104 S. Ct 1970 (1984)

[2] Injunctive relief is granted under 42 U.S.C. 1983 (1982) which reads in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

> Section 1983 is an exception to the Federal anti-injunction statute. The Supreme Court has decided that Congress intended to allow injunctive relief in §1983 actions. See Mitchum v. Foster, 407 U.S. 225, 238-42 (1972), (The Supreme Court holding that §1983 falls within "Act of Congress" exception to the anti-injunction statute).

[3] 42 U.S.C. §1988 (1982) codifies the Civil Rights Attorney's Fees Award Act of 1976, Pub. L. No. 94-559, §2, 90 State. 2641. Section 1988 states in part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, ...the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[4] See Appendix A, the First Report of Pulliam v. Allen Task Force, dated February 13, 1985.

[5] Alabama, Alaska, Arkansas, Arizona, Connecticut, Colorado, California, Delaware, the District of Columbia, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Oklahoma, Illinois, Indiana, Louisiana, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Vermont, Washington, Wisconsin, Wyoming, Utah.

APPENDIX A

FIRST REPORT OF PULLIAM V. ALLEN TASK FORCE

February 13, 1985

On August 2, 1984, the Conference of Chief Justices adopted two resolutions. Resolution No. V read in part:

> NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices
>
> 1. Urges the United States Congress to exempt state judges and judicial officers, acting in their judicial capacities, from assessment of attorney fees pursuant to 42 U.S.C. Sec. 1988;
>
> 2. Urges the Judicial Conference of the United States to initiate an early study of the exemption of state judges and judicial officers acting in their official capacities from the provisions of 42 U.S.C. Sec. 1988 and to support efforts to amend 42 U.S.C. Sec. 1988 to exempt state judges and judicial officers, acting in their official capacities, from the assessment of attorney fees.

Resolution No. VI read in part:

> NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices name from its membership a Task Force to develop studies concerning the impact of Pulliam upon:
>
> 1. The traditional and historical policy reasons behind the principles of judicial independence and judicial detachment.
>
> 2. The doctrinal foundations for the principles of judicial immunity, federalism, judicial restraint, comity, and the exhaustion of remedies.
>
> 3. The judiciary through creation of a new class of litigation against them.
>
> BE IT FURTHER RESOLVED that the final report of the Task Force be brought to the attention of The Judicial Conference of the United States, The Judicial Council of each Federal Circuit, The Judicial Conference of each Federal Circuit, the State-Federal Judicial Council of each state, the American Bar Association, each state bar association, and the judicial organizations of each state; and

> **BE IT FURTHER RESOLVED** that pending a study and report of the Task Force, that the Judicial Conference of the United States, Judicial Council of each federal circuit, the Judicial Conference of each federal circuit, and the State-Federal Judicial Council of each state be requested to consider the problems posed by Pulliam with the goal of the development of rules or policies for the application of the principles of comity and federalism in 42 U.S.C. Secs. 1983 and 1988 actions for injunctive relief and attorney fee awards against state judges and judicial officers pursuant to Pulliam.

The committee met on Monday, February 11, 1985, and on Wednesday, February 13, 1985. The committee's recommendations follow.

I. AMENDING 42 U.S.C. 1988

A number of organizations are seeking amendments to 42 U.S.C. 1983 and 1988. These groups include: the Reagan administration, which has proposed a bill on attorney fees; the National Association of Attorneys General, which supports the administration bill; the Lawyers Conference of the Judicial Administration Division of the ABA, which advocates amendments providing broad immunity to judges; the Judicial Immunity Committee of the JAD, which supports a limited amendment of 42 U.S.C. 1988 "to exclude from its attorney fee provisions members of the judiciary acting in their judicial capacity," and other trial judges organizations, which seek broader immunity. Congressman Gekas has introduced H.R. 877, a copy of which is appended hereto.

The proposed amendments fall within two broad categories: those which exclude attorney fees claims against judges only as to actions performed in any judicial capacity; and those which exclude attorney fee claims against judges while acting in both judicial and administrative capacities. The Task Force favors amendments along the line of the latter approach.

The proposed legislation involves chief justices in a political dispute in which we have an important interest, both personally and as representatives of other judges. Various courses of action are possible. One is to push for broad immunity and "compromise down as necessary." Another is to seek only immunity from attorney fees for actions performed in a judicial capacity.

The Task Force believes that our best course of action is to provide for flexibility in this political effort, and not to restrict ourselves to the most narrow relief.

Task Force Recommendation No. 1: that the Conference of Chief Justices support legislation amending 42 U.S.C. 1988 such as H.R. 877. [Note: Consistent with Recommendation No. 1, the Task Force recommends the passage of the attached unnumbered resolution, replacing Resolution V, portions of which are quoted above.]

II. COLLECTION OF DATA

A big problem to date has been the collection of comprehensive data regarding the effect of Pulliam upon judges, both trial and appellate. Everyone present at the meeting agreed that an effective plan to obtain such information be drawn and implemented.

Task Force Recommendation No. 2: that the Conference of Chief Justices authorize the Task Force to use all reasonable means to obtain information concerning the effect of the Pulliam decision upon judges, including canvassing each state and territory represented in the Conference of Chief Justices.

III. COURT APPEARANCES

Task Force Recommendation No. 3: that the Conference of Chief Justices authorize the Task Force: a) to file amici briefs in appropriate cases as determined by the Chairman of the Task Force; and b) to expend up to $10,000 for the preparation of amici briefs in future litigation involving *Pulliam* issues.

IV. MODEL LEGISLATION

Task Force Recommendation No. 4: that the Task Force draft model judicial immunity and indemnification legislation appropriate for enactment in each state, to be considered by the Conference of Chief Justices at its summer 1985 meeting.

V. SUPPORT OF THE AMERICAN BAR ASSOCIATION

Task Force Recommendation No. 5: that the members of the Conference of Chief Justices solicit the support of the American Bar Association to the end that the ABA will lend its assistance to the amendment of 42 U.S.C. 1988 as recommended in Task Force Recommendation No. 1.

* * * * *

RESOLUTION V

SUPPORT FOR AMENDMENT OF THE CIVIL RIGHTS ATTORNEY FEES AWARDS ACT, 42 U.S.C. 1988, TO EXEMPT JUDGES FROM ASSESSMENT OF ATTORNEYS FEES IN SUITS FOR INJUNCTIVE RELIEF PURSUANT TO 42 U.S.C. 1983

WHEREAS, the United States Supreme Court, on May 14, 1984, rendered its decision in Pulliam v. Allen (No. 82-1432) holding that judicial immunity is not a bar to injunctive relief "against a member of the judiciary acting in his judicial capacity" or to the award of attorney fees pursuant to the Attorney Fees Awards Act, 42 U.S.C. Sec. 1988; and

WHEREAS, adequate remedies are available within state judicial systems and the federal courts through injunctive relief without recourse to assessment of attorney fees; and

WHEREAS, the United States Congress should give further consideration to the impact of *Pulliam* on the judicial detachment and independence of state judges; and

WHEREAS, the United States Congress should give particular consideration to the impact of the assessment of 42 U.S.C., Sec. 1988 attorney fees on the independence of state judges and judicial officers; and

WHEREAS, the imposition of such fees against members of the judiciary strikes at the core of the entire judicial system, and

WHEREAS, the State-Federal Relations Committee and the Judicial Liability Insurance Committee of the Conference of Chief Justices have been actively involved in these issues on behalf of the Conference of Chief Justices;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices

1. Urges the United States Congress to exempt state judges and judicial officers, acting in their judicial capacities, from assessment of attorney fees pursuant to 42 U.S.C. Sec. 1988;

2. Urges the Judicial Conference of the United States to initiate an early study of the exemption of state judges and judicial officers acting in their official capacities from the provisions of 42 U.S.C. Sec. 1988 and to support efforts to amend 42 U.S.C. Sec. 1988 to exempt state judges and judicial officers, acting in their official capacities, from the assessment of attorney fees.

Proposed by the Committee on State-Federal Relations at the Conference of Chief Justices 36th Annual Meeting at Lake Ozark, Missouri on August 2, 1984.

RESOLUTION VI

IMPLEMENTATION OF RESEARCH ABOUT THE IMPACT OF PULLIAM v. ALLEN UPON JUDICIAL INDEPENDENCE, JUDICIAL IMMUNITY, FEDERALISM, JUDICIAL RESTRAINT, COMITY, EXHAUSTION OF REMEDIES, OTHER CONSTITUTIONAL PRINCIPLES, AND POLICY CONSIDERATION ABOUT THE CREATION OF A NEW CLASS OF LITIGATION, AND THE PASSAGE OF RULES OR POLICIES FOR IMPLEMENTATION OF THE PRINCIPLES, PARTICULARLY OF COMITY AND FEDERALISM

WHEREAS, the United States Supreme Court, on May 14, 1984, rendered its decision in *Pulliam v. Allen* (No. 82-1432) holding that judicial immunity is not a bar to injunctive relief "against a member of the judiciary acting in his judicial capacity" or to the award of attorney fees under the Civil Rights Attorney Fees Awards Act (42 U.S.C. Secs. 1983 and 1988); and

WHEREAS, state judges and judicial officers are alarmed about the impact of *Pulliam* on the independence of state judges and judicial officers;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices name from its membership a Task Force to develop studies concerning the impact of *Pulliam* upon:

1. The traditional and historical policy reasons behind the principles of judicial independence and judicial detachment.

2. The doctrinal foundations for the principles of judicial immunity, federalism, judicial restraint, comity, and the exhaustion of remedies.

3. The judiciary through creation of a new class of litigation against them.

BE IT FURTHER RESOLVED that the final report of the Task Force be brought to the attention of The Judicial Conference of the United States, The Judicial Council of each Federal Circuit, The Judicial Conference of each Federal Circuit, the State-Federal Judicial Council of each state, the American Bar Association, each state bar association, and the judicial organizations of each state; and

BE IT FURTHER RESOLVED that pending a study and report of the Task Force, that the Judicial Conference of the United States, Judicial Council of each federal circuit, the Judicial Conference of each federal circuit, and the State-Federal Judicial Council of each state be requested to consider the problems posed by *Pulliam* with the goal of the development of rules or policies for the application of the principles of comity and federalism in 42 U.S.C. Secs. 1983 and 1988 actions for injunctive relief and attorney fee awards against state judges and judicial officers pursuant to *Pulliam*.

Proposed by the Committee on State-Federal Relations at the Conference of Chief Justices 36th Annual Meeting at Lake Ozark, Missouri, on August 2, 1984.

POPE HONORS MAINE COUPLE

HON. OLYMPIA J. SNOWE

OF MAINE

IN THE HOUSE OF REPRESENTATIVES

Thursday, January 31, 1985

• Ms. SNOWE. Mr. Speaker, a couple residing in my congressional district has received a special decree from Pope John Paul II, in honor of their extraordinary accomplishment.

John and Anna Ivanisin, of Lisbon Falls, have been married now for 74 years, and for that the Pope presented them with a decree recognizing them as the longest married Roman Catholic couple in Maine. I believe that their marriage is a testament to the endurance and vitality of human compassion, and a symbol of the steadfastness of spirit and stability that characterizes the people of the State of Maine.

I want to add my congratulations and express my respect to the Ivanisins, and include a Lewiston Daily Sun article describing their recognition after my remarks:

LONGEST-MARRIED CATHOLIC COUPLE HONORED—IVANISINS CELEBRATE 74 YEARS TOGETHER

(By Connie Footman)

LISBON FALLS.—A Lisbon Falls couple, John and Anna Ivanisin, were presented a decree from Pope John Paul II Thursday afternoon, in recognition of their distinction as the longest married Roman Catholic couple in Maine.

The Ivanisins have been married 74 years.

Making a special visit to the couple's Lisbon Falls home, Bishop Edward C. O'Leary, bishop of the Diocese of Portland, celebrated Mass and presented the couple with the decree.

The decree featured a picture of the pope and a special message to the couple, which read in part, "The Holy Father commends John and Anna Ivanisin for their love of God and their Fidelity." The presentation was made in conjunction with World Marriage Day to be observed on Feb. 10.

John Ivanisin, a native of what was then Austria-Hungary, and Anna Karkos of New Jersey were married on April 19, 1910 in Lisbon Falls. Shortly thereafter, they moved into the large two story home that John built on 28 Free St., where the couple still live today.

Both worked in the textile mill in Lisbon Falls, then known as Worumbo Manufacturing Co., until their retirement.

An avid baseball player in his youth, Ivanisin still enjoys watching baseball on television.

The couple has five children, Ann Ivanisin, Margaret Ivanisin, Mrs. Catherine Anicetti, Mrs. Marion Kastner and John Ivanisin, seven grandchildren and 10 great-grandchildren.•

PULLIAM VERUS ALLEN

HON. GEORGE W. GEKAS

OF PENNSYLVANIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, January 31, 1985

• Mr. GEKAS. Mr. Speaker, I am today introducing legislation to alleviate a problem raised by the Supreme Court's decision in *Pulliam v. Allen* (No. 82-1432). In that case, the Court by a 5–4 majority held that judicial immunity is not a bar to the award of attorney's fees under the Civil Rights Attorney's Fees Awards Act even when damages themselves would be barred or limited by immunity doctrines.

In Pulliam, a justice of the peace imposed bail on defendants charged with a nonjailable offense and incarcerated those who did not post sufficient bond, in accordance with State law. The named defendants sought and received injunctive relief against this practice and were awarded $7,691.09 in attorney's fees under 42 U.S.C. 1988. The propriety of this relief was upheld by the Supreme Court.

The threat that this decision poses to the independence of our judiciary was stated in the dissent of Justice Powell, in which the Chief Justice as well as Justices O'Connor and Rehnquist joined. Even though the majority opinion of Justice Blackman recognized and upheld judicial immunity from suits for damages, the dissent warned that the decision opens the door for those who would harass judges with vexatious actions for injunctive relief and make such actions particularly attractive with the litigatory siren song of attorney's fees.

My proposed legislation is not intended to address the broad range of abuse to which 18 U.S.C. 1988 has been subjected and which Justice Powell scored (slip opinion, p. 1213). The legislation attempts only to isolate the major problem and to alleviate it. It does not prohibit the seeking of injunctive relief under 42 U.S.C. 1983 against judges, even though Justice Powell argued that the doctrine of judicial immunity should extend to such actions. Nor on the other hand does it codify that portion of the majority opinion, preferring rather to permit subsequent Court construction on the extent of judicial immunity.

My bill simply prohibits the award of attorney's fees against judges growing out of actions for injunctive relief. As Justice Powell noted in Pulliam, there is no difference between monetary damages against a judge and making him personally liable for a plaintiff's attorney's fees. The latter is the same as the former in its effect and would make even the most conscientious judge reticent about making the difficult decisions necessary to discharge his responsibilities.

Mr. Speaker, an independent judiciary is the essence of workable Democracy and must be protected not only from the encroachments of other branches of government, but also form other forms of intimidation.•

COMMEMORATIVE COINS FOR THE SCOUTS

HON. WILLIAM E. DANNEMEYER

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, January 31, 1985

• Mr. DANNEMEYER. Mr. Speaker, this year, and again in 1987, this Nation celebrates two important anniversaries. The first is the 75th anniversary of the Boy Scouts of America and it is followed, just 2 years later, by the diamond jubilee of the Girl Scouts, U.S.A. If ever there were two organizations deserving of recognition for what they have contributed to this country over th years, it is these two. Since their inception in 1910 and 1912 respectively, the Boy Scouts and the Girl Scouts have provided over 133 million youngsters with an opportunity to develop, in a properly supervised setting, new skills, and added confidence. Today, over 6 million boys and girls are members of Boy Scouts and Girl Scouts and their enthusiasm speaks volumes as to the continuing relevancy of scouting.

In view of this record of accomplishment, I feel it is only appropriate that we honor these two fine organizations as they get ready to celebrate their diamond jubilees. Therefore, in association with 16 original cosponsors (Mr. ROE, Mr. HORTON, Mr. RAHALL, Mr. DWYER, Mr. LAGOMARSINO, Mr. FROST, Mr. FRENZEL, Mr. MOORHEAD, Mr. BEVILL, Mr. BRYANT, Ms. MIKULSKI, Mr. DUNCAN, Mr. SKELTON, Mr. QUILLEN, Mr. EVANS of Iowa, and Mr. REGULA), I am today reintroducing legislation, first introduced in the 98th Congress, calling for the issuance of two commemorative coins, one to mark the 75th anniversary of the Boy Scouts and the other to remember the 75th anniversary of the Girl Scouts. Both coins would be 50 cent pieces, both would be legal tender, both would be coated instead of precious metal, and up to 10 million of each could be produced and made available for purchase. The cost of the coins, to the public, would be 50 cents or the cost of production whichever was higher, a figure low enough to enable scouts themselves to purchase the coins but sufficiently high to make it unlikely there would be any long-term cost to the taxpayer.

Although there haven't been many commemorative coins in recent years—the Olympic coins and the George Washington coin are the only ones that have been produced in the last 20 years—precedents certainly exist for the coins I am recommending. In fact, commemorative coins date all the way back to 1892 and, from that date until their temporary discontinuance in the early 1930's, 68 of them were issued. Moreover, three of those coins—all 50 cent pieces—were diamond jubilee coins, the first honoring the 75th anniversary of California statehood, the

99TH CONGRESS
1ST SESSION

H. R. 877

To prohibit the award of attorney's fees against judges growing out of actions for injunctive relief.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 31, 1985

Mr. GEKAS introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To prohibit the award of attorney's fees against judges growing out of actions for injunctive relief.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1988 of title 42, United States Code, is hereby amended to read as follows:

"§ 1988. Proceedings in vindication of civil rights; attorney's fees

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this title, and of title 'CIVIL RIGHTS,' and of title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce as a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. 1681 et seq.), or title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), except an action against a judge or other judicial officer arising out of acts done or omitted in the performance of the duties of that office, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.".

○

RESOLUTION XVI

Support For Amendment Of The Civil Rights Attorney Fees Awards Act, 42 U.S.C. 1988, To Exempt Judges From Assessment Of Attorneys Fees In Suits For Injunctive Relief Pursuant To 42 U.S.C. 1983

WHEREAS, the United States Supreme Court, on May 14, 1984, rendered its decision in Pulliam v. Allen (No. 82-1432) holding that judicial immunity is not a bar to injunctive relief "against a member of the judiciary acting in his judicial capacity" or to the award of attorney fees pursuant to the Attorney Fees Awards Act, 42 U.S.C. Sec. 1988; and

WHEREAS, adequate remedies are available within state judicial systems and the federal courts through injunctive relief without recourse to assessment of attorney fees; and

WHEREAS, the United States Congress should give further consideration to the impact of Pulliam on the judicial detachment and independence of state judges; and

WHEREAS, the United States Congress should give particular consideration to the impact of the assessment of 42 U.S.C., Sec. 1988 attorney fees on the independence of state judges and judicial officers; and

WHEREAS, the imposition of such fees against members of the judiciary strikes at the core of the entire judicial system; and

WHEREAS, the State-Federal Relations Committee and the Judicial Immunity Committee of the Conference of Chief Justices have been actively involved in these issues on behalf of the Conference of Chief Justices;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices:

1. Urges the United States Congress to exempt state judges and judicial officers, acting in their official capacities, from assessment of attorney fees pursuant to 42 U.S.C. Sec. 1988;

2. Urges the Judicial Conference of the United States to support efforts to amend 42 U.S.C. Sec. 1988 to exempt state judges and judicial officers, acting in their official capacities, from the assessment of attorney fees.

Adopted as proposed by the Ancillary Task Force to Prepare Report on Impact of Pulliam v. Allen at the Conference of Chief Justices Eighth Midyear Meeting in Williamsburg, Virginia on February 14, 1985.

(Replaces Resolution V, adopted August 2, 1984)

APPENDIX B

Conference of Chief Justices

PRESIDENT
Harry L. Carrico
Chief Justice
Supreme Court of Virginia
Post Office Box 1315
Richmond, Virginia 23210
(804) 786-2023

Secretariat
National Center for State Courts
300 Newport Avenue
Williamsburg, Virginia 23187-8798
(804) 253-2000

January 15, 1988

Honorable Harry L. Carrico
Chief Justice, Supreme Court
of Virginia
Post Office Box 1315
Richmond, Virginia 23219

Dear Chief Justice Carrico:

In March of 1985, we requested information concerning litigation involving judges in your state. The information provided at that time assisted our efforts to assess the impact of Pulliam v. Allen on litigation activity and case dispositions in state and federal courts. We also contacted you in June of 1986 and requested the updating of information on cases previously reported as pending in 1985 and information on cases brought against judges and other judicial officers since the survey in April 1985.

While efforts to amend 43 U.S.C. 1988 remain in progress, the Task Force to Prepare a Report on the Impact of Pulliam v. Allen, with the approval of the Conference, has requested that the survey be updated annually. Accordingly, I am writing to ask that information on cases previously reported as pending be updated, and that information on cases filed since your June 1986 response be provided. We would appreciate having your response by February 22, 1988. To assist with this request, a listing of cases previously reported is enclosed along with a form for reporting new cases. Please note that I am asking for two kinds of information: (1) new cases and (2) developments on cases pending on June 1, 1986.

Thank you for your cooperation.

Sincerely,

Edwin J. Peterson
Chairman, Task Force to Prepare
Report on the Impact of
Pulliam v. Allen

EJP/afg
Enclosures

Conference of Chief Justices

PRESIDENT
C.C. Torbert, Jr.
Chief Justice
Supreme Court of Alabama
Post Office Box 218
Montgomery, Alabama 36101
(205) 261-4599

Secretariat
National Center for State Courts
300 Newport Avenue
Williamsburg, Virginia 23187-8798
(804) 253-2000

April 18, 1988

TO: Members of the California Judges Association

FROM: Edwin J. Peterson, Chief Justice, Supreme Court of Oregon and Chairman, Conference of Chief Justices Task Force to Prepare Report on the Impact of Pulliam v. Allen

In May of 1985, The California Judges Association contacted you on our behalf and requested information concerning litigation involving judges in your state. The information provided at that time assisted our efforts to determine the impact of Pulliam v. Allen on litigation activity and case disposition in state and federal courts.

While efforts to amend 43 U.S.C. 1988 remain in progress, the Task Force to Prepare a Report on the Impact of Pulliam v. Allen of the Conference of Chief Justices had requested that the survey be updated. Accordingly, I am writing to ask that information on cases previously reported as pending be updated and that information on cases filed since the May 1985 response be provided. If you responded to our survey in 1985 and reported a case filed against a judge, enclosed is a copy of the previously reported case that needs to be updated. If information on the previously reported case is the same, write "no update needed" on the case form and return it. To update case information, please use a photocopy of the form, "42 USC 1983 Litigation Involving Judges or Judicial Officers", only fill in the section with the new information and attach it to the old form and return. To report new cases, use a photocopy of the same form and complete it.

We would appreciate having your response by MAY 5, 1988. Please send your completed questionnaire or other correspondence to:

Phillip A. Lattimore, III
Staff Associate
National Center for State Courts
300 Newport Avenue
Williamsburg, Virginia 23187-8798

Thank you for your assistance

January, 1988

QUESTIONNAIRE

LITIGATION AGAINST JUDGES AND JUDICIAL OFFICERS

The following questions seek information on the number and types of cases that have been brought against judges and other judicial officers (serving in your jurisdiction) since June 1, 1986. Please provide as much information as you reasonably can. This will be added to the information provided last June for cases filed from April, 1985 to June, 1986 (see enclosed list).

We would like to receive your response by February 22, 1988. Please send your completed questionnaire or other correspondence to Phillip A. Lattimore III, Staff Associate, National Center for State Courts, 300 Newport Avenue, Williamsburg, VA 23187-8798 (804) 253-2000 ext. 232

* * * * * * * * *

STATE ____________________ INDIVIDUAL RESPONDENT ____________________

ADDRESS ____________________

____

TELEPHONE NUMBER ____________________

Using a photocopy of the attached form for each case, please provide the following information on actions brought under 42 U.S.C. 1983 in state or federal court against judges and judicial officer since April, 1985.

a. Case caption (include Case Number or Cite)
b. Judge/Judicial officer defendants (include titles) and capacity in which sued - judicial or administrative
c. Court in which filed
d. Filing date
e. Basis for relief
f. Nature of case
g. Current status or disposition
h. Were attorney fees requested pursuant to 42 U.S.C. 1988? If so what is the current status of the attorney fee award request? Include size of award.
i. Name, address, and telephone number of attorney(s) representing the judge
j. Include any additional relevant information.
k. Please enclose with your response copies the sections of the legal briefs (filed in these cases) that deal with the attorney fee issue. Include a copy of the brief's title page.

STATE ___________

42 U.S.C. 1983 LITIGATION INVOLVING JUDGES OR JUDICIAL OFFICERS

Complete one of these forms for each case and attach the forms to the questionnaire cover sheet.

a. CASE CAPTION (INCLUDE CASE NUMBER OR CITE)

b. INDICATE ALL JUDGES OR JUDICIAL OFFICER DEFENDANTS, WITH TITLES

IN WHICH CAPACITY WERE JUDICIAL DEFENDANTS NAMED?
_________ JUDICIAL ____________ ADMINISTRATIVE ________ UNKNOWN

c. COURT IN WHICH FILED

d. FILING DATE

e. BASIS FOR RELIEF

f. NATURE OF CASE

g. CURRENT STATUS OR DISPOSITION

h. WERE ATTORNEY FEES, PURSUANT TO 42 U.S.C. 1988, REQUESTED? YES__NO__

IF SO, WHAT IS THE CURRENT STATUS OF ATTORNEY FEE AWARD REQUEST? INCLUDE SIZE OF AWARD.

i. NAME, ADDRESS, AND TELEPHONE NUMBER OF ATTORNEY(S) REPRESENTING JUDGE

____

j. INCLUDE ANY ADDITIONAL RELEVANT INFORMATION (USE SEPARATE SHEET IF NEEDED)

k. BRIEF SECTIONS DEALING WITH ATTORNEY FEES ISSUES ARE:

________ NOT APPLICABLE
________ ENCLOSED
________ WILL BE FORWARDED

December, 1987

Update of Previously Reported
Litigation Against Judges and Judicial Officers

The cases included on the attached list are the pending cases you reported to us in 1986. (In some states cases reported to us last year which did not involve judges, magistrates or hearing officers as defendants have been excluded.)

Please update the status or disposition of those cases pending at the time of your last report. We are particularly interested in information concerning requests for, and award or denial of attorney fees under 42 USC 1988 (please include size of awards).

You may respond directly on the list. Please return to:

PHILLIP A. LATTIMORE, III
Staff Associate
National Center for State Courts
300 Newport Avenue
Williamsburg, VA 23187-8798

STATE: ____________ INDIVIDUAL RESPONDENT: ____________

ADDRESS: ____________

____

TELEPHONE NUMBER: ____________

II

101st CONGRESS
1st Session

S. 590

To prohibit injunctive relief, or an award of damages against a judicial officer for action taken in a judicial capacity.

IN THE SENATE OF THE UNITED STATES

March 15 (legislative day, January 3), 1989

Mr. **Heflin** (for himself, Mr. **DeConcini**, Mr. **Grassley**, Mr. **Thurmond**, Mr. **Hatch**, Mr. **Simpson**, Mr. **Ford**, and Mr. **Gorton**) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To prohibit injunctive relief, or an award of damages against a judicial officer for action taken in a judicial capacity.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, **That section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting before the period at the end thereof ", except that in any action brought against a judicial officer for an act or omission committed in such officer's judicial capacity—**

"(1) such officer shall not be liable for costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction; and

"(2) injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable".

SEC. 2. Section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by adding before the period at the end of the first sentence: ", except that in any action brought against a judicial officer for an act or omission committed in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable".

SEC. 3. Notwithstanding any other provision of law, no judicial officer shall be held liable for any costs, including attorney's fees, in any proceeding brought against such judicial officer for an act or omission taken in a judicial capacity.

○

By Mr. HEFLIN (for himself, Mr. DECONCINI, Mr. GRASSLEY, Mr. THURMOND, Mr. HATCH, Mr. SIMPSON, Mr. FORD, and Mr. GORTON):

S. 590. A bill to prohibit injunctive relief, or an award of damages against a judicial officer for action taken in a judicial capacity; to the Committee on the Judiciary.

JUDICIAL IMMUNITY

Mr. HEFLIN. Mr. President, today I am reintroducing legislation to reverse the 1984 Supreme Court decision in *Pulliam* v. *Allen* (466 U.S. 522 (1984)). In Pulliam, a sharply divided—5 to 4—Court held that the doctrine of judicial immunity neither prevents injunctive relief in Federal civil rights actions challenging decisions of a State judge, nor bars attorney fee awards against the judge. In essence, Pulliam disregards four centuries of unbroken precedent and destroys an ancient doctrine that is the bedrock of the Anglo-American system of justice.

Understandably, this decision has caused a tremendous amount of concern among our Nation's judicial officers. Indeed, at the time Pulliam was handed down, the Conference of Chief Justices said of the decision: "No development in recent times has aroused greater concern on the part of State judges." If anything, that concern is greater today. Judges fear that this decision will have a chilling effect on judicial independence in both State and Federal courts, and I agree with them.

The ability of a judge to decide a case, without fear, is of paramount importance to judicial effectiveness. It is a cornerstone of our judicial system. Harassing litigation brought by disappointed parties against judicial officers can only result in the increasing timidity of judges, along with a tendency to avoid close and controversial decisions whenever possible. Consequently, the threat of a potential suit alone is enough to substantially impair the exercise of independence by judges.

In addition to the chilling effect of Pulliam on judicial independence, my colleagues in the judicial branch are concerned that this decision will create a new class of Federal litigation against State decisions. State court plaintiffs are placed, in effect, in a position of appealing to the Federal courts to enjoin State court action when they should be in State courts appealing through the State judicial system. This encroachment on the doctrine of federalism destroys comity between the two separate but equal judicial systems. State judges cannot act effectively if their decisions, no matter how closely they are made in keeping with State law, are subject to immediate challenge in the Federal courts.

Mr. President, the Court in Pulliam challenged us to remedy this situation by stating, "that it is for Congress, not this Court, to determine whether and to what extent to abrogate the judiciary's common-law immunity." Congress must accept this challenge.

A similar bill passed the Judiciary Committee of the 100th Congress, and it is my hope and desire that the full Senate will have an opportunity to debate this bill in the 101st Congress. I look forward to working with my colleagues on this bill, and ask for their support. I ask unanimous consent that the bill be printed in the RECORD.

Mr. THURMOND. Mr. President, today I rise as an original cosponsor of legislation which will prohibit injunctive relief and an award of attorneys' fees against judicial officers acting in their judicial capacity. This bill was introduced to address the erosion of judicial independence resulting from the Supreme Court decision in Pulliam versus Allen.

In a case of statutory interpretation, the Supreme Court in Pulliam held that judicial immunity is not a bar to injunctive relief or an award of attorney's fees against a judicial officer acting in his official capacity. This is simply not appropriate. Congress must rectify the omission of these prohibitions by amending the relevant Federal statutes.

The notion of judicial independence is deeply embedded in our common law heritage. It is essential to ensure justice because judicial officers must be free to make appropriate decisions within their official capacity without fear of reprisal. An independent judiciary is a vital component in any democracy which cannot be compromised.

Mr. President, the bill before us today will restore the independence of State court justices and judges. If enacted, it will prevent injunctive relief actions against State court judges unless a declaratory decree was violated. Additionally, claims for attorneys' fees in a Federal action will no longer subject judges to the threat of personal liability. As a result, judges will administer the law independently without fear of persecution. A similar bill was reported out of the Senate Judiciary Committee in the 100th Congress.

This legislation is most important, and I urge my colleagues to support its passage and enactment into law.

Mr. GORTON. Mr. President I am pleased to rise in support of my colleagues Senators HEFLIN, DECONCINI, THURMOND, HATCH, and GRASSLEY in introducing legislation to prohibit injunctive relief, or an award of damages against a State judicial officer for action taken in a judicial capacity. This legislation is essential to fulfill the historic function of judicial immunity to protect the independence of State and Federal courts, and preserve judicial Federalism. Judicial immunity is not for the protection of the judge but for the protection and integrity of the judicial process—it is essential to the rule of the law.

I look forward to working with many of you to protect and improve the efficiency of our judicial system through this bill.

STATEMENT OF

HARRY L. CARRICO

CHIEF JUSTICE, SUPREME COURT OF VIRGINIA
AND
PRESIDENT, CONFERENCE OF CHIEF JUSTICES

BEFORE THE

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

UNITED STATES SENATE

IN REGARD TO S. 590

OCTOBER 25, 1989

I AM HARRY L. CARRICO, CHIEF JUSTICE OF THE SUPREME COURT OF VIRGINIA AND PRESIDENT OF THE CONFERENCE OF CHIEF JUSTICES, THE ROLE WHICH BRINGS ME HERE TODAY AS A SURROGATE FOR OUR PREFERRED WITNESS, CHIEF JUSTICE EDWIN J. PETERSON OF THE SUPREME COURT OF OREGON. CHIEF JUSTICE PETERSON IS CHAIRMAN OF OUR COMMITTEE ON JUDICIAL IMMUNITY AND OUR RESIDENT EXPERT ON THE SUBJECT AT HAND.

UNFORTUNATELY, HE IS UNABLE TO BE HERE TODAY AND MY REMARKS, ACCORDINGLY, WILL BE BRIEF, AND I WILL ASK THAT HIS PREPARED STATEMENT BE ENTERED IN THE HEARING RECORD.

WE APPRECIATE THIS OPPORTUNITY TO AGAIN PRESENT OUR VIEWS, MR. CHAIRMAN, ON A MATTER THAT LIES AT THE HEART OF THE JUDICIAL FUNCTION, AND THUS AT THE HEART OF THE RULE OF LAW. THERE CAN BE NO QUESTION BUT THAT JUDICIAL IMMUNITY, AS WE HAVE KNOWN IT THROUGH SOME 400 YEARS OF COMMON LAW IN ENGLAND AND THE UNITED STATES, WAS NOT DESIGNED TO PROTECT

JUDGES FROM LEGAL OR OTHER SANCTIONS TO WHICH THEY MAY BE SUBJECT FOR ILLEGAL, UNETHICAL, OR ABUSIVE BEHAVIOR.

NOR DO WE SEEK SUCH PROTECTION TODAY. INDEED, THE JUDICIAL IMMUNITY WE ARE CONCERNED WITH IN S. 590 APPLIES ONLY TO THOSE DECISIONS JUDGES MAKE DAILY IN THE ADJUDICATION OF CASES OVER WHICH THEIR COURTS HAVE THE REQUISITE JURISDICTION, I.E., THE SOUGHT-FOR IMMUNITY WOULD APPLY ONLY TO DECISIONS JUDGES MUST MAKE IN THE PROPER DISCHARGE OF THEIR JUDICIAL DUTIES. IT DOES NOT APPLY TO OTHER OFFICIAL ACTIONS INCIDENT TO THE JUDICIAL OFFICE OR NECESSARY TO THE OPERATION OF THE COURTS, SUCH AS ADMINISTRATIVE DECISIONS ON THE HIRING OR DISCHARGE OF COURT PERSONNEL.

THE TYPICAL LAW SUIT AGAINST A STATE JUDGE UNDER THE FEDERAL CIVIL RIGHTS STATUTES INVOLVES A DECISION MADE BY THE JUDGE IN KEEPING WITH THE STATE LAW HE IS SWORN TO UPHOLD. IT IS UNCONSCIONABLE, IN OUR VIEW, FOR THE JUDGE TO

INCUR PERSONAL LIABILITY FOR DOING WHAT HE IS REQUIRED BY LAW TO DO.

THAT IS THE CORE PROBLEM S. 590 IS DESIGNED TO CORRECT. AND IT WOULD CORRECT THE PROBLEM WITHOUT DENYING ANY CITIZEN A DAY IN COURT.

THE LEGISLATION, MR. CHAIRMAN, WOULD DO NOTHING MORE THAN RESTORE JUDICIAL IMMUNITY TO ITS STATUS PRIOR TO PULLIAM V. ALLEN. IT WOULD DO WHAT THE SUPREME COURT ITSELF SUGGESTED CONGRESS MUST DO IF JUDGES ARE TO PERFORM THEIR VITAL AND DIFFICULT ROLE WITHOUT FEAR OF BECOMING DEFENDANTS THEMSELVES IN COSTLY LITIGATION. I SAY TO YOU IN ALL HONESTY, MR. CHAIRMAN, THAT WE SIMPLY CANNOT DO OUR JOB IF WE HAVE TO KEEP ONE EYE ON THE COURTROOM DOOR ANTICIPATING A VISIT BY A FEDERAL MARSHAL.

THIS IS THE THIRD CONGRESS, AND THE THIRD SET OF HEARINGS IN WHICH THE ISSUES HAVE BEEN DISCUSSED IN GREAT

DETAIL. THE LEGISLATION IS SPONSORED BY THE NATION'S THREE LEADING ORGANIZATIONS COMPOSED OF MEMBERS OF THE JUDICIARY AND THE LEGAL PROFESSION: THE JUDICIAL CONFERENCE OF THE UNITED STATES, THE AMERICAN BAR ASSOCIATION, AND THE CONFERENCE OF CHIEF JUSTICES.

IT IS INCONCEIVABLE THAT THESE ORGANIZATIONS, EACH DEDICATED TO THE PRESERVATION OF INDIVIDUAL RIGHTS UNDER THE RULE OF LAW, WOULD SUPPORT THESE MODEST PROPOSALS IF THEY POSED ANY REAL THREAT TO THE RIGHTS OF OUR CITIZENS.

IT IS A SIMPLE FACT, MR. CHAIRMAN, THAT THE RIGHT TO COLLECT ATTORNEY'S FEES FROM JUDGES DID NOT EXIST PRIOR TO PULLIAM AND THE RIGHT AS IT NOW EXISTS IS BASED ON A FIVE TO FOUR DECISION INTERPRETING A SINGLE STATUTE THAT DID NOT EVEN ADDRESS THE ISSUE OF JUDICIAL IMMUNITY. THE ONLY FUNDAMENTAL RIGHT OR LAW AT ISSUE HERE IS THE ANCIENT COMMON LAW DOCTRINE OF JUDICIAL IMMUNITY THAT HAS PROVIDED THE

CONCRETE IN THE FOUNDATIONS OF OUR LEGAL SYSTEM SINCE COLONIAL TIMES.

I SHALL LEAVE THE VERY IMPORTANT ISSUES OF FEDERALISM, COMITY, AND THE POWERFUL TECHNICAL ARGUMENTS IN SUPPORT OF JUDICIAL IMMUNITY TO MY OTHER COLLEAGUES AND TO CHIEF JUSTICE PETERSON'S PREPARED STATEMENT.

BUT I DO WANT TO SAY IN CONCLUSION, MR. CHAIRMAN, THAT WE IN THE STATE JUDICIARIES THINK IT IS LONG PAST TIME FOR CONGRESS TO ACT ON THE VERY SERIOUS PROBLEM POSED FOR US BY PULLIAM. THERE HAS BEEN NO SHOWING THAT JUDICIAL IMMUNITY FROM ATTORNEY FEE AWARDS LED TO ANY SUBSTANTIAL NUMBER OF INSTANCES SIMILAR TO PULLIAM. BUT THERE HAS BEEN AMPLE EVIDENCE TO SHOW THE CRITICAL IMPORTANCE OF SUCH IMMUNITY TO THE PROTECTION OF INDIVIDUAL RIGHTS AND THE RULE OF LAW THROUGHOUT OUR HISTORY.

WE THINK IT IRONIC THAT MISTRUST OF STATE COURT SYSTEMS SHOULD HAVE DELAYED ACTION ON THIS ISSUE AT A TIME WHEN STATE SUPREME COURTS HAVE BEEN EXPANDING INDIVIDUAL RIGHTS BEYOND FEDERAL MINIMUMS THROUGH INTERPRETATIONS OF THEIR OWN STATE CONSTITUTIONS. AND AT A TIME, AS YOU KNOW, MR. CHAIRMAN, WHEN THE COURTS OF VIRTUALLY EVERY STATE HAVE MADE REMARKABLE AND SUCCESSFUL EFFORTS TO IMPROVE THE ADMINISTRATION OF JUSTICE IN THE STATE SYSTEMS.

THESE EFFORTS WERE UNDERWAY WELL BEFORE PULLIAM AND WILL CONTINUE, WE TRUST, WELL AFTER PULLIAM HAS FADED INTO HISTORY.

I WILL BE PLEASED TO RESPOND TO ANY QUESTION YOU MAY HAVE.

QUESTIONS FROM SENATOR THURMOND

From Chief Justice Harry L. Carrico

Question 1 -- Pulliam clearly gives federal courts unncesssary authority over state judicial proceedings. In the first instance such authority is unnecessary because remedies for alleged civil rights violations normally are available under state law by direct appeal or collateral proceedings. Judges also are subject to disciplinary proceedings in every state.

In the Pulliam case itself, as Justice Powell noted in dissent, the Virginia Code provided two avenues of appeal:

Sec. 8.01-6545 provides that a "writ of habeas corpus ... shall be granted forthwith by any circuit court" to any person who shows there is probable cause to believe he is being unlawfully detained, and

Sec. 19.2-124 provides a specific procedure for appealing unreasonable bail determinations "successively to the next higher court ... up to the Supreme Court of Virginia".

Question 2 -- As noted above, there were two avenues for appeal in state court under Virginia law. Should a state remedy not be available a declaratory order, as provided for in S. 590, is all that is necessary. There is no reason to believe that a state court would defy the order of a federal court. But should this ever occur injunctive relief then would be available under S. 590. .

Question 3 -- Accurate data on federal civil rights actions against state judges are difficult to obtain. But the best data available indicate that such actions, while not showing an increase in the wake of Pulliam, are at a relatively high level. There also is reason to believe the volume may increase significantly as the bar becomes more widely informed on the decision and more expert in its use. But even the current level of filings is deeply disturbing to state judges whose judicial decisions, made to the best of their ability in keeping with the applicable state law, are subject to collateral attack in the federal courts with attendant attorney fee awards.

We must remember that S. 590 applies only to judicial decisions made in the exercise of proper jurisdiction, i.e., to those decisions a judge is required to make under the state law he is sworn to uphold. It would not protect egregious misconduct by a renegade judge. Indeed, it would not protect any judge acting beyond his or her jurisdiction.

QUESTIONS BY SENATOR KOHL

Question 1 -- There are many such examples. For instance:

1 -- A judge in a court of limited jurisdiction (such as a municipal judge having only traffic court jurisdiction) purports to consider and sentence a person for a felony.

2 -- A judge hears a case involving a family member when a statute provides that the judge has no jurisdiction in such cases.

3 -- A probate judge, whose court has jurisdiction only over wills and estates, tries a civil action for damages that is within the jurisdiction of the state's general trial court.

Question 2 -- As to point one, the proposed solution would, from the ACLU point-of-view, be redundant. It is the ACLU position that judges acting in their official capacities are not, under existing case law, personally responsible for attorney fee awards and that such awards must be paid by the state. But it also is apparent that the proposed legislation would require many state legislatures to adopt a position they have never before been willing to adopt. Judges are not in a position to force such legislative action.

As to point two, it is only necessary to point out that the federal judges involved in Pulliam did not bend over backwards in a spirit of comity and were quick to issue and sanction an injunction without deference to readily available state remedies. We also should note that it would be a highly exceptional circumstance if a state judge could continually violate constitutional rights without evoking an appropriate response under state law and procedures. The fact is that in many cases there has been no attempt to correct the trial judge's error by appeal. In most cases, appeal is an adequate remedy. S. 590 would not chill the exercise of rights by injured persons. However, it would reduce litigation in the federal courts.

QUESTIONS FROM SEN. GRASSLEY

Question 1 -- The quoted language from the Senate report is ambiguous and can be read to imply personal liability. Even if it is agreed that the "intent" was to bar personal liability the statutory language does not so provide. However, it is clear that in passing the legislation Congress had in mind only officials of the executive branch, not judges (or the doctrine of judicial immunity) who are never mentioned in the statute or the legislative history.

Question 2 -- If a federal judge believes relief is necessary against a state judge this relief can be granted as effectively by declaratory as by injunctive relief. Because S. 590 applies only to lawful judicial decisions, a state judge would have no reason to disobey a federal order, with or without the contempt sanction.

Senator **Helfin**. We will go ahead with the full panel.

Judge Roth.

STATEMENT OF HON. PHILLIP J. ROTH, JUDGE, FOURTH JUDICIAL DISTRICT, PORTLAND, OR, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Judge **Roth**. Senator Heflin, Senator Thurmond, on behalf of the National Conference of State Trial Judges, as chairman-elect, I wish to thank the committee for the opportunity to appear here today and testify on behalf of S. 590.

As pointed out by Senator Heflin, in 1984 the U.S. Supreme Court handed down this 5-to-4 decision in *Pulliam* v. *Allen*, which held judges subject to attorney fee liability in cases arising from judicial acts.

The American Bar Association appeared as an amicus in that case and argued strenuously that 42 United States Code 1988, Attorneys' Fee Award Act of 1976, was not intended to overthrow centuries of judicial immunity doctrine. Section 1988 was and is a narrow and strictly remedial response to the decision of the Supreme Court in *Alyeska Pipeline Service Corp.* v. *Wilderness Society*, a decision which severely restricted the authority of the Federal courts to award attorney fees in civil rights actions. However, the *Pulliam* court found much more in section 1988, holding that Congress intended to abrogate judicial immunity to attorney fee awards.

The result, unfortunately, just as the ABA predicted, a ripple of intimidation has spread across the country and into the courtrooms. The silent presence of potential liability impugns the impartiality of our judges and can only undermine the faith of our people in the fairness of our courts.

Before anything further is said respecting judges and their interests, let us clearly define the public interest in this matter: The public interest is in an independent and uncoerced judiciary, in judges free from extraneous pressures and personal threat.

It was the recognition of this interest, defended in the Federalist Papers, which resulted in the plan for the Federal judiciary given in the proposed Constitution of the United States. The public's need for fearless and unintimidated judges is just as great now as then and remains today the foremost consideration in deliberations on this bill.

An independent and unafraid judiciary is of greatest importance to the most vulnerable among us, those most readily subject to the prejudices and hatreds of others. My colleagues and I deeply appreciate the importance of our role in defending the rights of the individual and share the concerns of the ACLU and others in the forefront of civil rights initiatives.

The State courts of today have long since thrown off the impediments to justice which once concerned the reconstruction era Congress and have been, in my opinion, at least equally if not more sensitive and watchful of the rights of individuals than has the Federal court system.

Senator Heflin and Senator Thurmond, both of you are former members of the judiciary, so you understand our situation, but I will ask your nonlawyer colleagues, I would ask them to put themselves in the shoes of today's State court judge.

I would ask them for a moment that you may be sued for your conduct of legislative business, and that court ordered attorney fees may be levied against you if you lose your case or even if you settle it on terms providing some benefit to plaintiffs. Imagine that you are threatened with personal liability for your votes on the floor of the Senate or in this committee. Imagine that you can buy a "vote insurance" policy to protect yourself from damage and attorney fee awards for alleged wrongdoing as a legislator. I frankly ask the committee what would be your concerns.

As an informed legislator aware of your liability exposure, you might have purchased insurance coverage for liability arising out of your legislative duties. In most States, you probably enjoy a right of indemnity from the State if an award is made against you. Thus, your fears are not primarily financial, even if insurance and promises to indemnify do not offer absolute safety.

You are more likely to feel pressures that are professional and personal: The fear of damage to one's reputation or public career, the cost in time and energy of defending even the most frivolous of lawsuits and the disruption of one's official duties. Just as I can appreciate the powerful repercussions for a legislator of a controversial vote or position, so too may you appreciate the impact that a controversial opinion or sentence may have on a judicial career.

Now, since the inception of an insurance program in the fall of 1984, following the *Pulliam* decision, 1,027 claims have been made against the State trial judiciary, as of October 16, 1989, with a total of 2,622 policyholders as of this date, and with an average number of approximately 2,000 policyholders per year since 1985. Judges have felt the hot flames of personal litigation.

While millions of dollars in insurance coverage have been purchased, the burdens of defense in often frivolous claims and the emotional rigors of aggressive discovery tactics are more daunting every day. And to what purpose? To stem the abuse of individual civil rights? No, the express purpose of section 1988 was to fill the gap left behind by the *Alyeska* decision, not to respond to judicial infringement of civil rights.

Is this invitation to suit necessary to provide a method of oversight in the nature of a private attorney general concept? No. State judges have long been subject to a myriad of regulation and restriction: The appellate process of reversal and sometimes decisional chastisement; the availability of special proceedings such as mandamus and quo warranto; popular election and recall or retention approval by the people or commissions or legislative bodies; disciplinary commissions and oversight for lack of competence or personal or professional impropriety; scrutiny by the media and widely publicized ratings by bar or public polls—all of this we accept as part of the high responsibility of sitting in judgment on the lives and fortunes of our fellow citizens.

What is impossible to accept, however, is the prospect of being drawn into litigation over which we are supposed to preside, and of placing personal fortunes and reputations at risk whenever the difficult or unpopular decision must be made.

These developments do not serve the public interest in an efficient and independent judiciary. To the contrary, they challenge the impartiality of our courts and, just as importantly, the appearance of rigorous fairness, and thereby erode the political faith of our people in their judges.

In the words of Alexis de Tocqueville, said some 160 years ago:

> I am aware of a hidden tendency in the United States leading the people to diminish judicial power . . . I venture to predict that sooner or later these innovations will have dire results and that one day it will be seen that by diminishing the magistrate's independence, not judicial powers only, but the democratic republic itself has been attacked.

On behalf of the National Conference of State Trial Judges, I thank you for letting me appear today and strongly urge this committee to support S. 590.

Thank you.

[The prepared statement of Judge Roth and answers to questions submitted by Senators Thurmond, Kohl, and Grassley follow:]

AMERICAN BAR ASSOCIATION
GOVERNMENTAL AFFAIRS OFFICE • 1800 M STREET, N.W. • WASHINGTON, D.C. 20036 • (202) 331-2200

STATEMENT OF

JUDGE PHILLIP J. ROTH

of the

AMERICAN BAR ASSOCIATION

before the

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICES

of the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

on the subject of

JUDICIAL IMMUNITY -- S. 590

OCTOBER 25, 1989
WASHINGTON, D.C.

SENATOR HEFLIN, MEMBERS OF THE COMMITTEE, I AM MULTNOMAH COUNTY CIRCUIT COURT JUDGE PHILLIP J. ROTH, PRESIDENT-ELECT OF THE NATIONAL CONFERENCE OF STATE TRIAL JUDGES OF THE AMERICAN BAR ASSOCIATION. ON BEHALF OF APPROXIMATELY 2,100 OF AMERICA'S STATE TRIAL JUDGES, I WANT TO THANK THE COMMITTEE FOR THE OPPORTUNITY TO APPEAR AND TESTIFY TODAY ON S. 590. THIS BILL IS AN IMPORTANT AND MEASURED RESPONSE TO THE EROSION OF JUDICIAL IMMUNITY WHICH HAS OCCURRED DURING THE PAST SEVERAL YEARS. I DO NOT BELIEVE I EXAGGERATE WHEN I SAY THAT NO CONGRESSIONAL ACTION THIS YEAR WILL BE AS CRUCIAL TO THE CONTINUED INDEPENDENCE AND IMPARTIALITY OF OUR STATE JUDICIARIES.

IN 1984, THE U.S. SUPREME COURT HANDED DOWN A 5-4 DECISION IN THE CASE OF PULLIAM V. ALLEN WHICH HELD JUDGES SUBJECT TO ATTORNEY FEE LIABILITY IN CASES ARISING FROM JUDICIAL ACTS. THE AMERICAN BAR ASSOCIATION APPEARED AS AN AMICUS IN THAT CASE AND ARGUED STRENUOUSLY THAT 42 USC 1988 - ATTORNEYS' FEES AWARD ACT OF 1976 - WAS NOT INTENDED TO OVERTHROW CENTURIES OF JUDICIAL

IMMUNITY DOCTRINE. SECTION 1988 WAS AND IS A NARROW AND STRICTLY REMEDIAL RESPONSE TO THE DECISION OF THE SUPREME COURT IN ALYESKA PIPELINE SERVICE CORP. V. WILDERNESS SOCIETY, A DECISION WHICH SEVERELY RESTRICTED THE AUTHORITY OF THE FEDERAL COURTS TO AWARD ATTORNEY FEES IN CIVIL RIGHTS ACTIONS. HOWEVER, THE PULLIAM COURT FOUND MUCH MORE IN SECTION 1988, HOLDING THAT CONGRESS INTENDED TO ABROGATE JUDICIAL IMMUNITY TO ATTORNEY FEE AWARDS. THE RESULT UNFORTUNATELY IS JUST AS THE ABA PREDICTED: A RIPPLE OF INTIMIDATION HAS SPREAD ACROSS THE COUNTRY AND INTO ITS COURTROOMS. THE SILENT PRESENCE OF POTENTIAL LIABILITY IMPUGNS THE IMPARTIALITY OF OUR JUDGES AND CAN ONLY UNDERMINE THE FAITH OF OUR PEOPLE IN THE FAIRNESS OF OUR COURTS.

BEFORE ANYTHING FURTHER IS SAID RESPECTING JUDGES AND THEIR INTERESTS, LET US CLEARLY DEFINE THE PUBLIC INTEREST IN THIS MATTER: THE PUBLIC INTEREST IS IN AN INDEPENDENT AND UNCOERCED JUDICIARY, IN JUDGES FREE FROM EXTRANEOUS

PRESSURES AND PERSONAL THREAT. IT WAS THE RECOGNITION OF THIS INTEREST, DEFENDED IN THE FEDERALIST PAPERS, WHICH RESULTED IN THE PLAN FOR THE FEDERAL JUDICIARY GIVEN IN THE PROPOSED CONSTITUTION OF THE UNITED STATES. THE PUBLIC'S NEED FOR FEARLESS AND UNINTIMIDATED JUDGES IS AS GREAT NOW AS THEN AND REMAINS TODAY THE FOREMOST CONSIDERATION IN DELIBERATIONS ON THIS BILL.

AN INDEPENDENT AND UNAFRAID JUDICIARY IS OF GREATEST IMPORTANCE TO THE MOST VULNERABLE AMONG US, THOSE MOST READILY SUBJECT TO THE PREJUDICES AND HATREDS OF OTHERS. MY COLLEAGUES AND I DEEPLY APPRECIATE THE IMPORTANCE OF OUR ROLE IN DEFENDING THE RIGHTS OF THE INDIVIDUAL AND SHARE THE CONCERNS OF THE ACLU AND OTHERS IN THE FOREFRONT OF CIVIL RIGHTS INITIATIVES. THE STATE COURTS OF TODAY HAVE LONG SINCE THROWN OFF THE IMPEDIMENTS TO JUSTICE WHICH ONCE CONCERNED THE RECONSTRUCTION ERA CONGRESS AND HAVE BEEN, IN MY OPINION, AT LEAST EQUALLY IF NOT MORE SENSITIVE AND WATCHFUL OF THE RIGHTS OF INDIVIDUALS THAN

HAS THE FEDERAL COURT SYSTEM.

SENATOR HEFLIN AND MEMBERS OF THE COMMITTEE I WOULD ASK YOU TO PUT YOURSELVES IN THE SHOES OF TODAY'S STATE COURT JUDGE. IMAGINE FOR A MOMENT THAT YOU MAY BE SUED FOR YOUR CONDUCT OF LEGISLATIVE BUSINESS, AND THAT COURT ORDERED ATTORNEY FEES MAY BE LEVIED AGAINST YOU IF YOU LOSE YOUR CASE OR EVEN IF YOU SETTLE IT ON TERMS PROVIDING SOME BENEFIT TO PLAINTIFFS. IMAGINE THAT YOU ARE THREATENED WITH PERSONAL LIABILITY FOR YOUR VOTES ON THE FLOOR OF THE SENATE OR IN THIS COMMITTEE. IMAGINE THAT YOU CAN BUY A "VOTE INSURANCE" POLICY TO PROTECT YOURSELF FROM DAMAGE AND ATTORNEY FEE AWARDS FOR ALLEGED WRONGDOING AS A LEGISLATOR. I FRANKLY ASK THE COMMITTEE, WHAT WOULD BE YOUR CONCERNS?

AS AN INFORMED LEGISLATOR AWARE OF YOUR LIABILITY EXPOSURE, YOU MIGHT HAVE PURCHASED INSURANCE COVERAGE FOR LIABILITY ARISING OUT OF YOUR LEGISLATIVE DUTIES. IN MOST STATES, YOU PROBABLY ENJOY A RIGHT OF INDEMNITY FROM THE STATE IF AN AWARD IS MADE AGAINST YOU. THUS, YOUR

FEARS ARE NOT PRIMARILY FINANCIAL, EVEN IF INSURANCE AND PROMISES TO INDEMNIFY DO NOT OFFER ABSOLUTE SAFETY.

YOU ARE MORE LIKELY TO FEEL PRESSURES THAT ARE PROFESSIONAL AND PERSONAL: THE FEAR OF DAMAGE TO ONE'S REPUTATION OR PUBLIC CAREER, THE COST IN TIME AND ENERGY OF DEFENDING EVEN THE MOST FRIVOLOUS OF LAWSUITS AND THE DISRUPTION OF ONE'S OFFICIAL DUTIES. JUST AS I CAN APPRECIATE THE POWERFUL REPERCUSSIONS FOR A LEGISLATOR OF A CONTROVERSIAL VOTE OR POSITION, SO TOO YOU MAY APPRECIATE THE IMPACT THAT A CONTROVERSIAL OPINION OR SENTENCE MAY HAVE ON A JUDICIAL CAREER.

SINCE THE INCEPTION OF AN INSURANCE PROGRAM IN THE FALL OF 1984 FOLLOWING THE PULLIAM DECISION, 1,027 CLAIMS HAVE BEEN MADE AGAINST THE STATE TRIAL JUDICIARY AS OF OCTOBER 16, 1989. WITH A TOTAL OF 2,622 POLICY HOLDERS AS OF THIS DATE AND WITH AN AVERAGE NUMBER OF APPROXIMATELY 2,000 POLICY HOLDERS PER YEAR SINCE 1985, JUDGES HAVE FELT THE HOT FLAMES OF PERSONAL LITIGATION. WHILE MILLIONS OF DOLLARS IN INSURANCE COVERAGE HAVE BEEN

PURCHASED, THE BURDENS OF DEFENSE IN OFTEN FRIVOLOUS CLAIMS AND THE EMOTIONAL RIGORS OF AGGRESSIVE DISCOVERY TACTICS ARE MORE DAUNTING EVERY DAY. AND TO WHAT PURPOSE? TO STEM THE ABUSE OF INDIVIDUAL CIVIL RIGHTS? NO - THE EXPRESS PURPOSE OF SECTION 1988 WAS TO FILL THE GAP LEFT BEHIND BY THE ALYESKA DECISION, NOT TO RESPOND TO JUDICIAL INFRINGEMENT OF CIVIL RIGHTS. IS THIS INVITATION TO SUIT NECESSARY TO PROVIDE A METHOD OF OVERSIGHT IN THE NATURE OF A PRIVATE ATTORNEY GENERAL CONCEPT? NO, STATE JUDGES HAVE LONG BEEN SUBJECT TO A MYRIAD OF REGULATION AND RESTRICTION: THE APPELLATE PROCESS OF REVERSAL AND SOMETIMES DECISIONAL CHASTISEMENT; THE AVAILABILITY OF SPECIAL PROCEEDINGS SUCH AS MANDAMUS AND QUO WARRANTO; POPULAR ELECTION AND RECALL OR RETENTION APPROVAL BY THE PEOPLE OR COMMISSIONS OR LEGISLATIVE BODIES; DISCIPLINARY COMMISSIONS AND OVERSIGHT FOR LACK OF COMPETENCE OR PERSONAL OR PROFESSIONAL IMPROPRIETY; SCRUTINY BY THE MEDIA AND WIDELY PUBLICIZED RATINGS BY BAR OR PUBLIC POLLS. . . ALL OF

THIS WE ACCEPT AS PART OF THE HIGH RESPONSIBILITY OF SITTING IN JUDGMENT ON THE LIVES AND FORTUNES OF OUR FELLOW CITIZENS.

WHAT IS IMPOSSIBLE TO ACCEPT, HOWEVER, IS THE PROSPECT OF BEING DRAWN INTO LITIGATION OVER WHICH WE ARE SUPPOSED TO PRESIDE, AND OF PLACING PERSONAL FORTUNES AND REPUTATIONS AT RISK WHENEVER THE DIFFICULT OR UNPOPULAR DECISION MUST BE MADE. THESE DEVELOPMENTS DO NOT SERVE THE PUBLIC INTEREST IN AN EFFICIENT AND INDEPENDENT JUDICIARY. TO THE CONTRARY, THEY CHALLENGE THE IMPARTIALITY OF OUR COURTS AND, JUST AS IMPORTANTLY, THE APPEARANCE OF RIGOROUS FAIRNESS, AND THEREBY ERODE THE POLITICAL FAITH OF OUR PEOPLE IN THEIR JUDGES. IN THE WORDS OF ALEXIS DE TOCQUEVILLE:

> "I AM AWARE OF A HIDDEN TENDENCY IN THE UNITED STATES LEADING THE PEOPLE TO DIMINISH JUDICIAL POWER . . . I VENTURE TO PREDICT THAT SOONER OR LATER THESE INNOVATIONS WILL HAVE DIRE RESULTS AND THAT ONE DAY IT WILL BE SEEN THAT BY

DIMINISHING THE MAGISTRATE'S INDEPENDENCE, NOT JUDICIAL POWERS ONLY BUT THE DEMOCRATIC REPUBLIC ITSELF HAS BEEN ATTACKED."

ON BEHALF OF THE NATIONAL CONFERENCE OF STATE COURT JUDGES, I STRONGLY URGE THE COMMITTEE'S FAVORABLE CONSIDERATION OF S. 590.

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. 4TH AVENUE
PORTLAND, OREGON 97204

PHILLIP J. ROTH
JUDGE

ROOM 538
(503) 248-3181

November 15, 1989

Subcommittee on Courts and Administrative Practice
Senate Judiciary Committee
223 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators:

Enclosed please find my response to your questions for additional testimony in support of SB 590.

Should you need further information, please do not hesitate to contact me.

Sincerely,

Phillip J. Roth
PHILLIP J. ROTH

PJR/af

Enclosure

JUDGE PHILLIP J. ROTH - STATE JUDGE

FOURTH JUDICIAL CIRCUIT - PORTLAND, OREGON

1. Judge Roth, in your prepared statement you mention the concept of indemnification. How many jurisdictions currently have judicial indemnification statutes on the books? Could you briefly describe these statutes for us and how they work?

How many states have recently adopted indemnification statutes as a result of the *Pulliam* decision?

2. Judge Roth, in wake of the *Pulliam* decision, you as a state court judge could be required to pay attorney's fees. What protections, if any, do state court judges have if a state fails to indemnify them against an award of attorneys fees?

CIRCUIT COURT OF OREGON
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1021 S.W. 4TH AVENUE
PORTLAND, OREGON 97204

PHILLIP J. ROTH
JUDGE

ROOM 538
(503) 248-3181

November 15, 1989

Honorable Strom Thurmond
Senate Dirkson Building
Washington, D.C.

Dear Senator Thurmond:

In respect to your question (1) requesting information about the number of indemnification statutes presently on the books, the State Center of State Courts' latest survey shows the number to be fifteen listed as follows:

1) Connecticut
2) Delaware
3) Georgia
4) Illinois
5) Iowa
6) Maine
7) Nebraska
8) New Hampshire
9) New York
10) North Carolina
11) Utah
12) Vermont
13) Missouri
14) Michigan (General Statute)
15) Wisconsin (General Statute may apply to Judiciary)

Of the remaining 40 jurisdictions including American Samoa, District of Columbia, Guam, Puerto Rico, and the Virgin Islands, 12 reported that such legislation is being sought, namely:

1) District of Columbia
2) Florida
3) Kansas
4) Maryland
5) Michigan (has general coverage, but will seek additional statutory coverage)
6) Minnesota
7) Nevada
8) North Dakota
9) Ohio
10) Oklahoma
11) Pennsylvania
12) Texas

I will assume that the above 12 jurisdictions have sought the enactment of such statutes since the Pulliam decision. I do not have any information as to whether any such statutes were passed by any of the above jurisdictions.

Twenty-four of the above jurisdictions report that the judiciary is not seeking indemnification legislation.

Indemnification statutes differ throughout the United States. The Connecticut Statute provides indemnification for any state officer or employee if he is found to have been acting in the discharge of his duties or within the scope of his employment and the act or omission is found not to have been wanton, reckless or malicious.

The North Carolina statute provides for defense of all state employees in defense of civil or criminal actions in the scope or employment. It further provides that the state may pay judgments up to $100,000, the maximum amount payable for any one claim under the State Tort Claim Act.

In most jurisdictions the Attorney General defends the judge in absence of some disqualifying statutory provision such as gross negligence, wanton or wilful misconduct.

In absence of an indemnification statute or the existence of state tort act, a judge would be personally liable for an award of attorney fees. Such fees, in certain cases under Section 1988, have been known to be on a six figure level.

If the state fails to provide any form of indemnification against an award of attorney fees, insurance coverage is the only protection available against personal liability.

Insurance coverage can be costly and the carrier may find some defense to refuse representation or assume the defense subject to notice without recourse.

Sincerely,

Phillip J. Roth
PHILLIP J. ROTH

PJR/af

SENATOR HERB KOHL'S QUESTIONS FOR WITNESSES

1. Please provide a realistic example of a situation in which a judge's activities would be "clearly in excess" of his or her jurisdiction, justifying that officer's payment of costs under S. 590.

2. Last year, at a hearing on the predecessors to S. 590, Morton Halperin of the ACLU made two points that may deserve consideration. First, he contended that the fairest solution is for states to pass statutes agreeing to be sued for costs in cases brought against state judges. "That would mean," Halperin said, "that you would sue the judge if necessary for declaratory or injunctive relief, but you then sue the State for the attorneys' fees." Second, Halperin stated:

> The normal comity between judicial officers and the respect for federalism which the Supreme Court has recently emphasized will, we believe, lead federal judges to bend over backwards to avoid issuing injunctions against state judges except in the most egregious situations. In such cases, where a state judge is continually violating the constitutional rights of persons under his or her jurisdiction, the federal court should be free to enjoin the action.

How would you respond to Halperin's and the ACLU's concerns?

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. 4TH AVENUE
PORTLAND, OREGON 97204

PHILLIP J ROTH
JUDGE

ROOM 538
(503) 248-3181

November 15, 1989

Honorable Herbert Kohl
Senate Dirkson Building
Washington, D.C.

Dear Senator Kohl:

In response to your first question, an example of a judge clearly acting in excess of his or her jurisdiction sometimes happens in arrest procedures. An officer appears before the magistrate to initiate a charge against an individual and without a supporting affidavit by the officer, the court issues an order of arrest. However, in a fact situation where a probation officer requests a warrant against an offender currently being supervised on probation, a charge of a violation of such probation condition would not require an affidavit by the probation officer before the court could issue a valid warrant of arrest.

In jurisdictions for example where a judge's jurisdiction may be limited to probate and guardianship, trying a felony or personal injury claim before such court would clearly be in excess of such court's authority and be declared a nullity.

By such examples I do not infer attorney fees should be allowed. Numerous other remedies are available such as mandamus, quo warranto, and if a criminal matter, habeas corpus. Procedurally we have the most liberal appellate system in the world protecting individuals on a civil or criminal level.

We have today as part of our justice system throughout our country a strong public defenders network with the courts liberally construing who is entitled to be classified as an indigent for appointed counsel. Agaih on the civil side of the court, we have a national network of legal aide offices that represent individuals on a personal basis such as landlord-tenant problems, bankruptcy and family law matters. Further, the legal profession under the leadership of the American Bar Association has instituted a national program of lawyers offering millions of hours of pro bono work for those unable to afford legal services.

The claim for attorney fees under Section 1988 is in most instances not a legislative claim for funding of counsel, but a weapon used to intimidate the courts.

The latest figure from the National Center of State Courts is that only 15 states have indemnification statutes. However, Halperin's contention begs the question when he claims it to be the solution. This is a claim based on false premise.

Assuming for a moment there is some validity to enacting indemnification statues, based on the difficulty of having the great majority of the states to support such legislation, the court system could suffer irreparable damage in the interim.

As I stated, this is a false premise in response to the threat to the basic principal of judicial immunity. Whether the state pays for the claim against the judge acting in his or her judicial capacity or whether the judge is personally responsible does not deal with the issue of judicial independence.

The diversion of the judge's energy, time and concentration to respond to pre-trial discovery if not the trial itself is the basic premise to be answered by the issue created by the Pulliam decision. The multitude of remedies available to an aggrieved litigant, does not require throwing the judge into the litigant pit.

The volume of litigation against judges for the various cases under the many civil rights statutes rebuts the claim that this is a rare event. Whether the federal courts are prepared to exercise abstention to some claims does not remove the legal response required to resolve such charges. By analogy, it would require a member of the Congress to make a court appearance every time a voter decided to go to court to litigate the legislative vote or other legislative acts of a member of Congress.

One should not side-step the basic concepts of judicial immunity and judicial independence by speaking of indemnity which does not work in most cases and does not solve the problems mentioned in the last two paragraphs. Judicial independence like legislative independence is a vital concept necessary to maintain the successful operation of our respective branches of government with our country's unique system of checks and balances.

Sincerely,

Phillip J Roth

PHILLIP J. ROTH

PJR/af

Questions submitted by Senator Grassley
QUESTIONS FOR WITNESSES IN SUPPORT OF S. 590

1. In ~~their~~ a letter to Chairman Heflin dated October 24, 1989, the NAACP Legal Defense and Educational Fund (LDF) states as follows:

> "It was clearly contemplated by Congress when it enacted the Civil Rights Attorneys' Fees Act of 1976 that fees be awarded against the appropriate governmental entity, whether state, county, or local."

The LDF cites a Senate Committee report (S. Rep. No. 94-1011 at p. 5) from the time of passage of Section 1988 as follows:

> "[I]t is intended that the attorneys fees, like other items of cost, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)."

The LDF goes on to note that at footnote 7 of the report, it is said that only where an official had acted in bad faith could he possibly be personally liable for fees.

DO YOU AGREE OR DISAGREE WITH THIS ANALYSIS OF THE LEGISLATIVE INTENT OF THE FEES ACT? PLEASE EXPLAIN.

2. The LDF letter criticizes S. 590 as follows:

> "The provision dealing with injunctive relief would unduly hamper federal judges in the exercise of their judgment against state officials in the expectation that they will obey the law. If, however, a federal judge, based on the facts of the case before it, believes an injunction is necessary, he or she should be free to issue one. When this provision is coupled with the ban on attorneys' fees, civil rights plaintiffs will be faced with having to go back to court with no possibility of compensation for the time required."

DO YOU AGREE OR DISAGREE WITH THIS ANALYSIS OF WHY INJUNCTIVE RELIEF SHOULD BE AVAILABLE AGAINST STATE COURT JUDGES? PLEASE EXPLAIN.

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S. W. 4TH AVENUE
PORTLAND, OREGON 97204

PHILLIP J. ROTH
JUDGE

ROOM 528
(503) 248-3181

November 15, 1989

Honorable Charles E. Grassley
Senate Dirkson Building
Washington, D.C.

Dear Senator Grassley:

I strongly disagree with the NAACP Legal Defense and Educational Fund's interpretation of the totality of purpose of the Civil Rights Attorney Fees Act of 1976. I am taking the liberty of enclosing a copy of the Pulliam amicus brief which my law clerk and I prepared for the ABA. It appeared to us that based on legislative history supported by the language of the Senators authorizing the bill that Section 1988 had the limited purpose of closing the gap left by the Alyeska decision. Both in argument and purpose for such remedial legislation, did it appear that hundreds of years of judicial immunity was initially threatened by this case. No judicial organization came forth to oppose this legislation believing the fundamental doctrine of judicial immunity was not in jeopardy.

Not since the Dred Scott decision has a holding come forth from the Supreme Court undermining the strength and integrity of an equal branch of government. Justice Powell's dissent which I enclose exposes the fallacy and muddled thinking of the majority opinion. When such damage is caused by a judicial decision, Congress must act to close the void.

The American Rule of not collecting attorney fees by the prevailing party to litigation unless provided by statute or contract never contemplated the decision maker being part of this grotesque and bizarre result.

The majority of the cases being filed against the state judiciary acting in their judicial capacity are handled on a summary judgment level. Nevertheless, when one is sued, an initial appearance must be made and a file opened. This means an attorney must be retained to represent the judge and the high cost of attorney fees begins to run. In the vast majority of such proceedings, only the attorney representing the judge is going to be paid by the state, the insurance carrier, or the judge personally. Often the litigant challenging the judge is only filling the coffers of the defense counsel and not those of the alleged aggrieved party.

If in the rare case when attorney fees are collected by the litigant where a judge is acting in his or her judicial capacity are we going to undermine and subject an equal branch of government to intimidation and delay to finance such litigation? If that is to become public policy and accountability, then consistency may require legislative immunity be subject to the same erosion by the challenge of every disgruntled voter.

The NAACP's position would destroy for a few extra dollars the institution and foundation which exists to protect the rights of the people they represent.

Injunctive relief is at best an extraordinary remedy that can be subject to abuse by the federal courts. Therefore, the parameters of its use must be carefully prescribed. Special proceedings such as mandamus, quo warranto, and habeas corpus are readily available to the litigant along with access to a liberal appellate system. It appears to me that unless a state trial court has violated an existing declaratory decree or such declaratory relief is not available, injunctive relief should not be used as an instrument to intimidate and threaten the state trial court.

Sincerely,

Phillip J. Roth

PHILLIP J. ROTH

PJR/af

No. 82-1432

In the Supreme Court
of the United States

OCTOBER TERM, 1982

GLADYS PULLIAM, Magistrate for the
County of Culpeper, Virginia,
Petitioner,

vs.

RICHARD R. ALLEN, and
JESSE W. NICHOLSON,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION

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The American Bar Association (hereinafter A.B.A.) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of petitioner that the decision below should be reversed. Consent to file this brief has been sought from the parties and granted by petitioner, but counsel for respondents has refused to consent. It is therefore necessary to request leave of this Court to file the accompanying brief, pursuant to Rule 42.

The constituency of the A.B.A. includes legal professionals from every state and territory and the District of Columbia in all fields of legal endeavor. This breadth of experience and concern has prompted the A.B.A. to file briefs *amicus curiae* with this Court on numerous occasions.

This case is of substantial importance to the A.B.A. because of its longstanding interest in the proper administration of justice and the concern on the part of the Judicial Administration Division that judicial immunity would be seriously endangered by a decision affirming the court below. The A.B.A. has concluded that the integrity of our legal system and the objectivity and independence of our courts would suffer by such a decision.

The A.B.A. believes the accompanying brief will be of assistance to the Court because of its broad based experience in matters affecting the administration of justice.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION

INTEREST OF AMICUS CURIAE

The American Bar Association (hereinafter A.B.A.) is a voluntary, national membership organization of the legal profession. Its nearly 285,000 members come from every state and territory and the District of Columbia. Its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges at the state and federal levels, legislators, law professors, law students, and a number of nonlawyer "associates" in allied fields. Since its inception 105 years ago, the A.B.A. has taken an active interest in the improvement of the administration of justice.

The A.B.A. is convinced that sensitive issues of great public importance are at stake in this case, and that the Court's decision may have widespread consequences for both the Bench and the Bar. The issue in this case is whether judges are subject to fee awards under 42 U.S.C. § 1988 for their judicial acts. The implications of this question alone are far reaching, given § 1988's broad application. But, as this brief's argument will demonstrate, the impact of this case will reach far beyond § 1988 to virtually every fee shifting provision in federal civil rights law. The consistency with which these various fee provisions have been interpreted is testimony to the important precedent that will be established in this case.

The A.B.A. strongly endorses the Congressional commitment to enforcing civil rights that is evident in § -1988. However, the A.B.A. also recognizes the need to preserve the independence and integrity of the judicial system through which those rights are vindicated. Attorney fee liability for judicial action threatens the independence of the judiciary by raising the possibility that judicial decisions may be affected by concern over personal financial liability. Preserving faith in the objectivity of our judiciary depends on insulating their judgment from the burdens and risks of litigation.

SUMMARY OF ARGUMENT

The possibility that judges may be required to pay attorney's fees is an unacceptable threat to judicial independence and impartiality. Fee awards simply are not distinguishable from monetary damages for immunity purposes. It does not follow from the fact that judicial conduct may be enjoined in some circumstances that judges also may be required to pay damages or attorney fees. The former remedy no more affects judicial independence than does the possibility of reversal, but a monetary sanction would strike at the heart of neutral and detached decision making. *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980), is not to the contrary; it holds only that fees may be imposed on judges acting in an administrative enforcement, not a judicial, capacity. And no case other than the one at bar holds that judges may be made personally liable for attorney's fees because of acts of a purely judicial character.

Neither the language nor the legislative history of § 1988 reveals an intention to abrogate judicial immunity. The language is silent as to that. The history establishes an intention to resurrect the practice of many courts before this Court's decision in *Alyeska Pipeline Service Corp.* v. *Wilderness Society*, 421 U.S. 240 (1975), of awarding fees in actions brought under § 1983 in some circumstances, but that practice has never gone so far as to abrogate the immunity of judges for their judicial conduct.

ARGUMENT

A. The policies underlying the immunity of judges from paying damages for their judicial acts apply equally to subjecting judges to attorney's fees under § 1988.

The centuries-old doctrine of judicial immunity has enjoyed unqualified support in Supreme Court jurisprudence. Beginning with *Bradley* v. *Fisher*, 80 U.S. (13 Wall) 335 (1871), the Court has repeatedly affirmed the crucial importance of insulating judicial decision-making from the fear of liability, harassment by unsatisfied litigants and the burdens of defending civil actions. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Butz* v. *Economou*, 438 U.S. 478 (1978); *Ferri* v. *Ackerman*, 444 U.S. 193 (1979); *Nixon* v. *Fitzgerald*, 102 S. Ct. 2690 (1982). "Despite the unfairness to litigants that sometimes results, the doctrine of judicial immunity is thought to be in the best interests of 'the proper administration of justice . . . [for it allows] a judicial officer, in exercising the authority vested in him [to] be free to act upon his own convictions, without apprehension of personal consequences to himself'." *Stump* v. *Sparkman*, *supra*, at 363 (quoting from *Bradley* v. *Fisher*, *supra)*. This reasoning also applies to awards of attorney fees under § 1988.

This Court has recently noted in *Hensley* v. *Eckerhart*, 51 U.S. Law Week 4552, 4555 (1983), that "complex civil rights litigation" may be "lengthy and demand many hours of lawyers' services." Both that case and this one arose under § 1983. Attorney's fees may be substantial. The fees awarded by the District Court in *Hensley* amounted to $133,230. But even the $7,308 awarded in this case can impose a substantial burden on a state magistrate or judge.

The broad and uncertain scope of exposure under § 1988 and the uncertain magnitude of the possible fees which might be imposed would further enhance the intimidating effect of § 1988 if judges were required to pay fees. Although conscientious judges may resist or disregard the possibility of such fees, such a concern should not be allowed even to enter their minds before they decide a case one way or the other. The potential for personal liability for attorney's fees should not be permitted to threaten principled decision-making.

The threat of fee exposure is not lessened by the possibility that fee awards may be paid from public funds. Not all states so provide, and in those that do, indemnification statutes reveal widely varying and discretionary standards for indemnifying the defendant judge. Exclusions abound for "intentional," "deliberate," or other acts taken in "bad faith." *See,* Murphey, *Judicial Immunity and Indemnification of State Officers and Employees,* National Center for State Courts Memorandum, Ref. No. RIS 83.001 (1982). Because these statutes focus on the state of mind of the actor, they introduce significant uncertainty as to the nature and extent of state protection.

B. The fact that injunctive or declaratory relief may be granted against judges does not mean that they can be required to pay attorney's fees.

The Court of Appeals in this case apparently did not face up to, or even mention any of the above considerations. It seemed to assume that judges could be held liable in attorney's fees because judicial immunity did not preclude the granting of injunctive or declaratory relief (though not damages) under § 1983, and because in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980), the Court had held that attorney fees could be awarded against judges for action taken in an administrative enforcement capacity. Although recognizing that this Court had found the Virginia judges immune from liability for conduct in their "legislative capacity," the court below failed to recognize that the same conclusion applied *a fortiori* to the conduct of a court acting in its judicial capacity.

The nature of the act complained of here is clearly judicial. The setting of bail in criminal matters is a well established judicial function entrusted to the courts. As this Court held in *Stump* v. *Sparkman*, 435 U.S. 349, 362-363 (1978), conduct is regarded as judicial for purposes of judicial immunity if it is "the type of act normally performed by judges" and is performed in a judge's "judicial capacity."

The Court of Appeals cases relied upon in the opinion below do not support its position. In *Morrison* v. *Ayoob*, 627 F.2d 669, 672 (3rd Cir. 1980), *cert.*

denied, 449 U.S. 1102 (1981), the Third Circuit noted that fees were being sought against the defendant judges "only in their official capacities." Indeed, the Court noted that "the county and state court administrator" had "entered appearances in the district court and actively participated in all phases of the case", and "arguably could be responsible for the award." *Id.* at 673. Similarly, in *Entertainment Concepts, Inc.* v. *Maciejewski*, 631 F.2d 497, 507 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981), which did not involve judges but other local officials, the defendants were sued only in their official capacities.

The ultimate conclusion of the court below was that "because prospective relief was properly awarded against Magistrate Pulliam* . . . [plaintiff] was entitled to an award of attorney fees under 42 U.S.C. § 1988." *Allen* v. *Burke*, 690 F.2d 376 (4th Cir. 1982), at 379. For the reasons stated above, the premise simply does not support that conclusion.

C. Congress did not abrogate judicial immunity to fee awards by enacting 42 U.S.C. § 1988.

This Court's decisions establish beyond doubt that judges are immune from damages liability for their judicial acts. *See*, cases cited at p. 4, *supra*. Although Congress may abrogate this immunity, the cases require a "clear indication" of such intent, a requirement in no way satisfied by the general language of § 1988. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Briscoe* v. *Lahue*, 51 U.S. Law Week 4247 (1983). "The immunity of judges for acts within the judicial role is . . . well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." *Pierson, supra*, at 554-555.

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* For this the Court relied upon its own prior decision in *Timmerman* v. *Brown*, 528 F.2d 811, 814 (4th Cir. 1975), rev'd on other grounds *sub. nom.*, *Leeke* v. *Timmerman*, 454 U.S. 83 (1981).

No such specific provision clearly indicating that abrogation of judicial immunity was intended can be found in the language of § 1988 or in that section's legislative history. There is no specific reference to judicial immunity in § 1988. To convert such silence into a showing of affirmative Congressional intention to terminate the immunity, the legislative history would have to point in that direction with unquestionable clarity, but the legislative history also contains no specific reference to judicial immunity. If anything, it supports the contrary conclusion.

Senate Report 94-1011, 94 Cong., 2nd Sess., U.S. Code Cong. and Admin. News, 5908 (1976) accompanied S. 2278, the bill which ultimately passed Congress and became 42 U.S.C. § 1988. The Senate Report makes clear that S. 2278 was drafted in response to this Court's holding in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975.)* In *Alyeska*, the Court held that absent a showing of bad faith, federal courts cannot award fees to prevailing parties without express Congressional authorization. The Court thereby disapproved the established federal court practice of exercising equitable power to award fees to prevailing civil rights plaintiffs. S. 2278 was intended to provide the authorization found lacking in *Alyeska*.

---

* The House Report shows that the same was true of S. 2278's House counterpart, H.R. 15460. *See*, H. Rep. No. 94-1558, 94th Cong., 2nd Sess., at 2.

The express intent both of S. 2278 and H.R. 15460 was to reestablish, in the wake of *Alyeska*, "the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866." S. Rep. 94-1011, *supra*, at 5909-10. *See*, also, H. Rep. No. 94-1558, 94th Cong., 2nd Sess. (1976), at 5-6. The emphasis was on the *familiarity* of the remedy.

Both reports expressly adopt the standards developed under the fee provisions of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k). S. Rep. 94-1011, *supra*, at 5912. H. Rep. No. 94-1558, *supra*, at 5. The standards developed under § 402 of the Voting Rights Act Amendment of 1975, 42 U.S.C. 1973(e), and the Emergency School Aid Act of 1972, 20 U.S.C. 1617, also were cited with approval. H. Rep. 94-1558, *supra*, at 5; S. Rep. 94-1011, *supra*, at 5913. Since 1976, numerous cases have construed § 1988 in light of these statutes and repeatedly have held them to be virtually identical. Eg., *Ward* v. *Dearman*, 626 F.2d 489 (5th Cir. 1980); *Johnson* v. *Bd. of Education, City of Chicago*, 604 F.2d 504 (7th Cir. 1979); *Chicano Police Officer's Assoc.* v. *Stover*, 624 F.2d 127 (10th Cir. 1980); *Wheeler v. Durham City Bd. of Ed.*, 585 F.2d 618 (4th Cir. 1978); *Zarcone* v.

Perry, 581 F.2d 1039 (2nd Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *Wharton* v. *Knefel*, 562 F.2d 550 (8th Cir. 1977); *Northcross* v. *Bd. of Ed. of Memphis*, 611 F.2d 624 (6th Cir. 1979), *cert denied*, 447 U.S. 911 (1980). Indeed, this Court also has had occasion to equate the meaning of these fee shifting provisions. *Hanrahan* v. *Hampton*, 446 U.S. 754, 758 n. 4 (1980).

The explicit Congressional and judicial equation of § 1988 to these fee provisions makes available to this Court a large and decisive body of precedent with which to determine the intent of Congress in enacting § 1988. These precedents reveal no intent whatsoever to abrogate judicial immunity to fee awards.

This conclusion is reinforced by the remarks of S. 2278's supporters on the Senate floor. Time and time again, the Senate was assured that S. 2278 contained "no startling new remedy."

The author of S. 2278, Senator Tunney, expressly approved existing standards for fee awards under § 1988:

> "Mr. President, the action that I ask the Senate to take today is far from unique. Fifty-four Federal statutes presently authorize the award of fees in areas as diverse as antitrust, freedom of information, consumer product safety, banking, international relations, and patents, to name only a few. S. 2278, when enacted, will close a loophole in our present civil rights enforcement laws.
>
> "In *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), the Supreme Court

expressly stated that the lower Federal courts had no inherent equity power to award attorney's fees in civil rights cases absent statutory direction. *This bill creates the necessary authorization and is addressed to the key questions raised in the opinion.* * * *

"The award, Mr. President, must be reasonable and *the courts have been exceptionally clear in stating their views on this aspect of the problem.* In *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) the court of appeals listed 12 factors to be considered in computing the fees * * *

"S. 2278 also provides for awards to the prevailing party, a more moderate approach than limiting recovery to prevailing plaintiffs. This was designed to avoid bringing vexatious or harassing lawsuits by allowing the award of fees to prevailing defendants under those circumstances. *United States Steel Corp.* v. *United States*, 519 F.2d 359, 364 (3rd Cir. 1975). At the same time, *existing case law is clear on the point* that prevailing plaintiffs 'should ordinarily recover our attorney's fees unless special circumstances would render such an award unjust.' *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam).

"Finally, S. 2278 states that the fees are to be allowed in the discretion of the court. That discretion has been included in the most recent civil rights statutes allowing attorneys' fees and *the standards enunciated* in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) *have been more than ample.*" 122 Cong. Record, at 32185. (Emphasis supplied).

Speaking in support of Senator Allen's amendment regarding IRS litigation, Senator Tunney again relied on existing judicial standards for fee awards:

> "Essentially, it would apply to a situation where a taxpayer is harassed by the IRS. In such a case, a court has discretion to award reasonable attorney fees to the defendant. *The standard to be applied is the one the courts have adopted with respect to prevailing defendants, as described in the Senate report." Id.* at 33312. (Emphasis supplied).

Senator Kennedy, a member of the Judiciary Committee and author of an amendment on the floor including Title IX under the provisions of § 1988, also expressly endorsed existing standards:

> "This bill now before us, Mr. President, does not create any new legal remedies, nor does it expand our civil rights laws into any new areas which Congress has not previously considered
>
> * * *
>
> "Furthermore, the bill will not create any new burdens for the courts. *Rather, it is intended simply to expressly authorize the courts to continue to make the kinds of awards of legal fees that they had been allowing prior to the Alyeska decision." Id.* at 31473. (Emphasis supplied).

Still another member of the Judiciary Committee, Senator Scott of Pennsylvania, explicitly limited § 1988 awards to those authorized under prior statutes:

> "The enactment of S. 2278 is needed to assure that attorneys' fees will be available in suits brought under the reconstruction-era civil rights

> laws, Title VI of the 1964 Civil Rights Act, and Title IX of the Education Amendments of 1972 *in the same fashion and to the same extent as the statutes presently provide* in some cases brought under Title VII of the 1964 Civil Rights Act." *Id.* at 31471. (Emphasis supplied).

Senator Hathaway reiterated this adoption of established fee shifting principles under § 1988:

> "This bill would add the same type of fee shifting provision contained in portions of every major civil rights statutes which do not specifically authorize fee awards, thereby achieving consistency in the civil rights laws.
>
> "This bill, then, contains no startling new remedy — it only meets the technical requirements that the Supreme Court laid down *if the courts are to continue the practice of awarding attorneys' fees which had been going on for years* prior to the *Alyeska* decision." *Id.* at 31832 (1976). (Emphasis supplied). *See*, also, S. Rep. 94-1011, *supra*, at 5913, which contains the same language.

Both the Senate and House reports on the bills which became § 1988 make reference to the immunities enjoyed by state and local officials. Neither report mentions judicial immunity nor an intent to abrogate it. The Senate report, S. Rep. 94-1011, *supra*, at 5913, states as follows:

> "As with cases brought under 20 U.S.C. Sec. 1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it

> is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from State or local government (whether or not the agency or government is a named party)." (Footnotes omitted).

It first should be noted that this statement is prefaced by reference to 20 U.S.C. § 1617. As previously asserted, *amicus* are unaware of any case under that section which holds judicial action susceptible to fee awards. Second, the statement contains no express reference to judicial immunity or its abrogation. Third, the reference to 20 U.S.C. § 1617 and the ordinary type of fee liability for executive misconduct leave this portion of the report best understood as referring to already established executive fee exposure. *See, Consumers Union, supra,* at 739. In any event, this reference to official liability can in no way be construed as a specific provision clearly indicating an intention to abrogate *judicial* immunity.

The House Report on H.R. 15460 has provided the one bare instance of support, however inadequate, for those urging fee liability for judicial acts. The relevant portion of the House Report is as follows:

> "Furthermore, while damages are theoretically available under the statutes covered by H.R. 15460, it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17] Consequently, awarding counsel fees to prevailing plaintiffs in such liti-

> gation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected." H. Rep. 94-1558, *supra*, at 9.

Footnote 17 to the preceeding quotation cites three decisions by this Court: *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Pierson* v. *Ray*, 386 U.S. 547 (1967). On the basis of the House Report's language and reference to *Pierson*, both the court below and the Third Circuit found the requisite Congressional intent to abrogate judicial immunity — although the Third Circuit was careful not to find that judges can be held individually liable. *Morrison* v. *Ayoob*, 627 F.2d 669, 672 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981).

This language and citation fall far short of the required specific manifestation of intent to abolish judicial immunity. The meaning or significance of the citation to *Pierson* is, at best, ambiguous. *Pierson* established the qualified damages immunity of police officers as well as the absolute immunity of judges. 386 U.S. at 554-557. With respect to the latter, the Court stated: "The immunity of judges for acts within the judicial role is . . . well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." *Id.* at 554-555. To which immunity or "special defense" does the Report refer? The phrase "public officials" does not necessarily include judges. If both were intended, why did the Report not refine the meaning of the reference by citing separate cases standing for each doctrine? Moreover, having cited *Pierson,* the Report's author certainly was aware of the explicit Congressional expression necessary to abrogate judicial immunity. Why then was specific mention not made of the immunity, as *Pierson* still requires? The inclusion of *Pierson* with *Wood* and *Scheuer,* in combination with the failure to provide specifically for judicial immunity, leaves the Report's citation best understood as approving the already qualified status of executive immunity, not as expressing an intention to reduce the established scope of judicial immunity.*

The ambiguous House Report thus clearly is not enough in itself to express a Congressional intent to abrogate judicial immunity.

The overwhelming weight of the legislative history taken as a whole compels the conclusion that Congress simply did not intend to work such an abolition. Both Congressional reports, as well as the remarks on the Senate floor, repeatedly emphasize the continuation of past practice, consistency in the interpretation of fee provisions and, because of the immediate need to respond to *Alyeska,* a desire to avoid controversial new remedies. On balance, the conclusion is inescapable that Congress merely intended § 1988 to extend already well established fee shifting principles to those civil rights laws left bare by *Alyeska,* without in any way affecting the long-standing doctrine of judicial immunity from personal financial liability for judicial acts.

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* A review of the records of the House Committee also reveals no express intent to abrogate judicial immunity. *Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, House of Representatives, 94th Cong., 1st Sess., Oct. 6, 8, and Dec. 3, 1975.* Significantly, the author of the House Report, Congressman Drinan, makes no mention of abrogating judicial immunity in his statement to the Committee. *Id.* at 54.

Both judicial independence and the appearance of judicial impartiality would be gravely endangered by withholding judicial immunity in suits under § 1988 or in other types of cases.

> "I am aware of the hidden tendency in the United States leading the people to diminish judicial power . . . I venture to predict that sooner or later these innovations will have dire results and that one day it will be seen that by diminishing the magistrate's independence, not judicial powers only but the democratic republic itself has been attacked." Tocqueville, *Democracy in America* (Mayer and Lerner, Ed., 1966), at 246.

This Court should not countenance a step in that direction.

CONCLUSION

For the reasons outlined above, the Court should reverse the decision below.

Respectfully submitted,

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No. 82-1432

In the Supreme Court
of the United States

OCTOBER TERM, 1982

GLADYS PULLIAM, Magistrate for the
County of Culpeper, Virginia,
Petitioner,

vs.

RICHARD R. ALLEN, and
JESSE W. NICHOLSON,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ENTRY OF APPEARANCE

The Clerk will enter my appearance as Counsel of Record for the American Bar Association, who in this court is *Amicus Curiae.*

I certify that I am a member of the Bar of the Supreme Court of the United States.

MORRIS HARRELL
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PROOF OF SERVICE — CERTIFICATE BY BAR MEMBER

I, PHILLIP J. ROTH, one of the attorneys for the American Bar Association, *Amicus Curiae* herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 9th day of June, 1983, I served copies of the foregoing Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* on the parties thereto, as follows:

1. On Counsel for the Petitioner, Gladys Pulliam, by mailing three copies in a duly addressed envelope, with air mail postage prepaid, to William G. Broaddus, Deputy Attorney General for the State of Virginia, at

his offices at 101 North Eighth Street, Richmond, Virginia 23219.

2. On Deborah C. Wyatt, Counsel for Respondents Richard R. Allen and Jesse W. Nicholson, by mailing three copies in a duly addressed envelope with air mail postage prepaid to offices of counsel at 917 East Jefferson Street, Charlottesville, Virginia 22901.

PHILLIP J. ROTH
Attorney for American Bar
Association, *Amicus Curiae*
1021 Southwest Fourth Avenue
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Supreme Court of Virginia v. *Consumers Union of United States, Inc.*, 446 U. S., at 738–739 ("The House Committee Report on [§ 1988] indicates that Congress intended to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damages awards").

Congress' intent could hardly be more plain. Judicial immunity is no bar to the award of attorney's fees under 42 U. S. C. § 1988.

The judgment of the Court of Appeals, allowing the award of attorney's fees against petitioner, is therefore affirmed.

It is so ordered.

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

The Court today reaffirms the rule that judges are immune from suits for damages, but holds that they may be sued for injunctive and declaratory relief and held personally liable for money judgments in the form of costs and attorney's fees merely on the basis of erroneous judicial decisions. The basis for the Court's distinction finds no support in common law and in effect eviscerates the doctrine of judicial immunity that the common law so long has accepted as absolute.

The Court recognizes that the established principle of judicial immunity serves as the bulwark against threats to "independent judicial decisionmaking," *ante*, at 531. Yet, at the same time it concludes that judicial immunity does not bar suits for injunctive or declaratory relief with the attendant claims for costs and attorney's fees. The Court reasons that "[f]or the most part, injunctive relief against a judge raises concerns different from those addressed by the protection of judges from damages awards." *Ante*, at 537. This case illustrates the unsoundness of that reasoning. The Court affirms a $7,691.09 money judgment awarded against a state Magistrate on the determination that she made erroneous judicial decisions with respect to bail and pretrial detentions. Such a judgment poses the same threat to independent judicial decisionmaking whether it be labeled "damages" of $7,691.09 or "attorney's fees" in that amount. Moreover, as was held a century and a half ago, an "action before one Judge for what is done by another . . . [is a] case . . . against the independence of the Judges." *Taaffe* v. *Downes*, reprinted in footnote in *Calder* v. *Halket*, 13 Eng. Rep. 12, 18, n. *(a)* (P. C. 1840). The burdens of having to defend such a suit are identical in character and degree, whether the suit be for damages or prospective relief. The holding of the Court today subordinates realities to labels. The rationale of the common-law immunity cases refutes the distinction drawn by the Court.

I

Since 1869, this Court consistently has held that judges are absolutely immune from civil suits for damages. See, *e. g.*, *Stump* v. *Sparkman*, 435 U. S. 349 (1978); *Pierson* v. *Ray*, 386 U. S. 547 (1967); *Bradley* v. *Fisher*, 13 Wall. 335 (1872); *Randall* v. *Brigham*, 7 Wall. 523 (1869). We have had no occasion, however, to determine whether judicial immunity bars a § 1983 suit for prospective relief. See *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.*, 446 U. S. 719, 735 (1980).[1] It is clear that Congress did not limit the scope of common-law immunities in either § 1983[2] or § 1988.[3] We, therefore, have looked to the common law to determine when absolute immunity should be available. A review of the common law reveals nothing that suggests—much less requires—the distinction the Court draws today between suits for prospective relief (with the attendant liability for costs and attorney's fees) and suits for damages.

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[1] Respondents' argument that this Court has "at least implied that judicial immunity did not bar [declaratory or injunctive] relief" misreads the precedents. Brief for Respondents 12. Respondents rely on the cases cited in note 14 of the Court's opinion in *Consumers Union*, 446 U. S., at 735. None of those cases addressed the issue of judicial immunity from prospective relief. In *Mitchum* v. *Foster*, 407 U. S. 225 (1972), appellant filed a § 1983 claim against state judicial and law enforcement officials seeking to enjoin state-court proceedings under an allegedly unconstitutional state law. The only issue considered by this Court was whether § 1983 was an authorized exception to the anti-injunction statute that allowed federal courts to enjoin state-court proceedings. In *Boyle* v. *Landry*, 401 U. S. 77 (1971), appellees filed a § 1983 claim against state judicial and law enforcement officials seeking to enjoin the enforcement of state statutes on the ground that such enforcement was used to harass and deter appellees from exercising their constitutional rights. This Court found that appel-

The doctrine of judicial immunity is one of the earliest products of the English common law.[4] It was established to protect the finality of judgments from continual collateral attack in courts of competing jurisdiction[5] and to protect

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lees had not been threatened with prosecution and held that the lower court had lacked Art. III jurisdiction. The suit against judicial officials in *O'Shea* v. *Littleton*, 414 U. S. 488 (1974), was dismissed on the same ground. Although the lower court in *Gerstein* v. *Pugh*, 420 U. S. 103 (1975), had ordered injunctive relief against judicial officers, only the state prosecutor sought review. Thus, the Court did not consider the propriety of the relief awarded against the judicial officers.

[2] See *Pierson* v. *Ray*, 386 U. S. 547, 554–555 (1967).

[3] In *Consumers Union*, *supra*, at 738, the Court observed that "[t]here is no . . . indication in the legislative history of the Act to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity." Similarly, there is no indication in the legislative history of the Act to suggest that Congress intended to diminish the scope of judicial immunity.

[4] The doctrine was recognized as early as the reign of Edward III (1327–1377). See 6 W. Holdsworth, A History of English Law 234–235 (2d ed. 1937).

[5] During the early medieval period, there was no such thing as an appeal from court to court. Judges were not immune from suits attacking their judicial acts, and the common procedure for challenging a judicial ruling was to file a complaint of "false judgment" against the judge. 1 W. Holdsworth, A History of English Law 213–214 (7th ed. 1956); 6 Holdsworth, at 235. At this time, the King's Bench was the central common-law court, and it vied for jurisdiction with the local feudal courts and the ecclesiastical courts. To protect the finality and authoritativeness of its decisions from collateral attack in these competing courts, the King's Bench borrowed the idea of appellate procedure from the ecclesiastical

judicial decisionmaking from intimidation and outside interference.[6] Gradually, the protection of judicial independence became its primary objective. The specific source of intimidation articulated by the English common-law cases was the threat of vexatious litigation should judges be required to defend their judicial acts in collateral civil proceedings. In *Taaffe* v. *Downes*, *supra*, at 18, n. *(a)*, the justices observed: "If you once break down the barrier . . . and subject [judges] to an action, you let in upon the judicial authority a wide, wasting, and harassing persecution . . . ." The common-law cases made no reference to the effect on judicial independence of particular remedies such as an award of damages.

The early opinions of this Court echo the principal justification for the immunity doctrine articulated at English common law. In *Bradley* v. *Fisher*, *supra*, the emphasis was on the

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courts. R. Pound, Appellate Procedure in Civil Cases 25–26 (1941). To ensure this procedure, it was necessary to immunize the judicial acts of common-law judges from collateral attack—hence the doctrine of judicial immunity.

[6] Because the judge rather than the prevailing party to the original suit became the named defendant in a complaint for false imprisonment, it was the judge who suffered the burdens of litigation and the consequences of any adverse judgment. The burdens of litigation could be substantial. In the early days, the defendant judge was required, at his own expense, to prepare a record setting forth the proceedings upon which his challenged judicial decisions were made and to send four suitors of the court to bring the record before the King's Bench. *Id.*, at 26. If the judgment was found to be false, the judge was amerced or fined. 6 Holdsworth, at 235. The common law recognized that the threat of personal litigation would jeopardize the independence of judicial decisionmaking: judges, to avoid being called before a hostile tribunal to account for their judicial acts, could be deterred by personal considerations from judging dispassionately the merits of the cases before them. See *Taaffe* v. *Downes*, 13 Eng. Rep., at 23, n. *(a)* ("A Judge . . . ought to be uninfluenced by any personal consideration whatsoever operating upon his mind, when he is hearing a discussion concerning the rights of contending parties; otherwise, instead of hearing them abstractedly, a considerable portion of his attention must be devolved to himself").

burden of harassing and vexatious litigation. The Court observed:

> "If . . . a judge could be compelled to answer in a civil action for his judicial acts, . . . he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party . . . that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party." *Id.*, at 349.

Addressing the need for judicial independence, the Court therefore concluded:

> "'The public are deeply interested in th[e] rule [of judicial immunity], which . . . was established in order to secure the independence of the judges, and prevent them being harassed by vexatious actions.'" *Ibid.* (quoting *Fray* v. *Blackburn*, 3 B. & S. 576, 578, 122 Eng. Rep. 217 (1863)).

The justification for the immunity doctrine emphasized in *Bradley* has been repeated in subsequent decisions by this Court. See, *e. g.*, *Pierson* v. *Ray*, 386 U. S., at 554; *Butz* v. *Economou*, 438 U. S. 478, 512 (1978). In these cases as well, the burdens of litigation, rather than the threat of pecuniary loss, are cited as posing a threat to judicial independence and occasioning the need for immunity. These burdens apply equally to all suits against judges for allegedly erroneous or malicious conduct. It is immaterial whether the relief sought is an injunction as in this case, or damages as in *Pierson* v. *Ray* or *Stump* v. *Sparkman*. Indeed, the Court today, largely ignoring that it was the burden of litigation that motivated the common-law immunity, makes no argument to the contrary. Unless the rationale of *Bradley* and the common-law cases is rejected, judicial immunity from suits against judges for injunctive relief must be coextensive with immunity from suits for damages.

II

A

The Court nevertheless argues that the common law of England can be viewed as supporting the absence of immunity where the suit is for injunctive relief. The Court concedes, as it must, that suits for injunctive relief against a judge could not be maintained either at English common law or in the English courts of equity. *Ante*, at 529. Injunctive relief from inequitable proceedings at common law was available in equity "to stay [a common-law] trial; or, after verdict, to stay judgment; or, after judgment, to stay execution." J. Story, Equity Jurisprudence ¶874, p. 72 (11th ed. 1873). But such relief was available only against the parties to the common-law proceedings and not against the judge. *Id.*, ¶875, at 72. The suit for injunctive relief at issue here is precisely the type of suit that the Court concedes could not have been maintained either at common law or in equity. The Court, however, reasons that the writs of prohibition and mandamus present a "common-law parallel to the § 1983 injunction at issue here." *Ante*, at 529.

The prerogative writs of mandamus and prohibition are simply not analogous to suits for injunctive relief from the judgments of common-law courts, and the availability of these writs against judicial officials has nothing to do with judicial immunity. It has long been recognized at common law that judicial immunity protects only those acts committed within the proper scope of a judge's jurisdiction, but provides no protection for acts committed in excess of jurisidiction.[7]

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[7] See 6 Holdsworth, *supra* n. 4, at 236–237:

"[I]n *The Case of the Marshalsea*, 'a difference was taken when a court has jurisdiction of the cause, and proceeds . . . erroneously, there . . . no action lies [against a judge]. . . . But when the court has not jurisdiction of

Because writs of prohibition and mandamus were intended only to control the proper exercise of jurisdiction,[8] they posed no threat to judicial independence and implicated none of the policies of judicial immunity. Thus, the judges of England's inferior courts were subject to suit for writs of mandamus and prohibition, but judicial immunity barred all suits attacking judicial decisions made within the proper scope of their jurisdiction.[9] There is no allegation in this case that petitioner exceeded her jurisdiction. The suit for injunctive relief is based solely on an erroneous construction and application of law. It is precisely this kind of litigation that the common-law doctrine of judicial immunity was intended to prohibit.

B

The Court's observation that prerogative writs may have been used at English common law to correct errors of judgment rather than excesses of jurisdiction is irrelevant to the case at bar. We "rely on the common-law practice in shaping our own doctrine of judicial immunity," *ante*, at 536, only to the extent that the common-law practices consulted are consistent with our own judicial systems. The Court's reliance on English common-law practice ignores this constraint. It was the rivalry between the English temporal and spiritual courts that induced the King's Bench to adopt the myth that

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the cause, then the whole proceeding is *coram non judice*, and actions [against the judge] will lie'" (quoting *Case of the Marshalsea*, 10 Co. Rep. 68b, 76a, 77 Eng. Rep. 1027, 1038 (K. B. 1613)).

See also *Bradley* v. *Fisher*, 13 Wall. 335, 351–353 (1872).

[8] See 1 Holdsworth, *supra* n. 5, at 228–229.

[9] Holdsworth observed:

"'[I]t is agreed that the judges in the king's superior courts are not liable to answer personally for their errors in judgment. . . . [I]n courts of special and limited jurisdiction . . . a distinction must be made, but while acting within the line of their authority they are protected as to errors in judgment; otherwise they are not protected.'" 6 Holdsworth, *supra*, at 239, n. 4 (quoting *Miller* v. *Seare*, 2 Bl. W. 1141, 1145, 96 Eng. Rep. 673, 674–675 (K. B. 1777)).

misapplication of substantive common law affects the court's jurisdiction.[10] As the Court points out, the relationship between the King's Bench and its rival ecclesiastical courts finds no parallel in our judicial system. *Ante*, at 535. There is no indication that the courts of this country ever resorted to the fictional use of prerogative writs found at English common law. To the contrary, our courts expressly have rejected the fiction and have limited the use of mandamus and prohibition to jurisdictional issues or to cases where the court has a clear duty to act. See *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943). See also *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, 382–383 (1953); *Will* v. *United States*, 389 U. S. 90, 103–104 (1967).

Nor is there any indication that the expansive use of prerogative writs in England modified the doctrine of judicial immunity in this country.[11] Indeed, the sparing use of the writs of prohibition and mandamus in American jurisprudence has been motivated in large part by the concern for judicial independence. Cases counseling restraint in the use of prerogative writs repeatedly have observed that such writs have "the unfortunate consequence" of "plac[ing] trial judges in the anomalous position of being litigants without counsel other than uncompensated volunteers." *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, 258 (1957). See also *Kerr* v. *United States District Court*, 426 U. S. 394, 402 (1976); *Bankers Life & Casualty Co.*, *supra*, at 384–385; *Ex parte Fahey*, 332 U. S. 258, 259–260 (1947). In response to this concern, the Federal Rules of Appellate Procedure have provided that the respondent judge in a proceeding for mandamus or prohibition may elect not to appear in the proceeding without conceding the issues raised in the petition. Fed. Rule App. Proc. 21(b).[12] Finally, courts consistently have held that concerns for judicial independence require that any award of costs to a prevailing party in an action for mandamus or prohibition be made only against the party at interest and not against the judge. The United States Court of Appeals for the First Circuit explained:

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[10] For example, the Court cites Gordon, The Observance of Law as a Condition of Jurisdiction, 47 L. Q. Rev. 386, 393 (1931), which provides:

"The idea that to misapply or fail to apply substantive . . . law affects a judicial tribunal's jurisdiction, even when it acts within its province, is now generally recognized as wrong. That there was at one time doubt upon the point was due to the former hostility of the King's Bench toward . . . the ecclesiastical Courts. Although the King's Bench admitted it could not redress mere error in such Courts, it could, of course, restrain their excesses of jurisdiction through the writ of prohibition. And under the pretext that it was merely keeping them within their jurisdiction, it issued prohibitions to these Courts whenever they applied or construed any statute in a way the King's Bench did not approve of." (Footnotes omitted.)

See also 3 W. Blackstone, Commentaries *113–*115; Dobbs, The Decline of Jurisdiction By Consent, 40 N. C. L. Rev. 49, 60–61 (1961).

[11] As early as the decision in *Bradley* v. *Fisher*, this Court drew a clear distinction between erroneous judicial acts committed within a judge's jurisdiction, for which there was absolute immunity, and acts committed in excess of jurisdiction, for which there was none. 13 Wall., at 351–353. This distinction, coupled with the principle that writs of mandamus and prohibition could issue only to correct clear jurisdictional errors, hardly suggests that the easy availability of prerogative writs against England's ecclesiastical courts limited the scope of judicial immunity in this country.

> "It would be contrary to the fundamental rules protecting the freedom of judicial action to tax costs against a judge of any one of the constitutional courts of the United States by reason of any failure to apprehend the

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[12] Rule 21(b) provides in relevant part:

"If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted."

Indeed, the Court of Appeals for the District of Columbia Circuit has not even required that the judge be joined as a party. In *United States* v. *King*, 157 U. S. App. D. C. 179, 183, 482 F. 2d 768, 772 (1973), the court reasoned: "In the federal courts, when the purpose of mandamus is to secure a ruling on the intrinsic merits of a judicial act, the judge need not—and desirably should not—be named as an active party, but at most only as a nominal party with no real interest in the outcome."

> law correctly." *In re Haight & Freese Co.*, 164 F. 688, 690 (1908).

Accord, *Cotler* v. *Inter-County Orthopaedic Assn.*, 530 F. 2d 536, 538 (CA3 1976).

In sum, the perceived analogy to the use of prerogative writs at English common law simply does not withstand analysis. As shown above, the analogy rests on a peculiar practice at English common law that was occasioned by the unique relationship between the King's Bench and England's ecclesiastical courts. That relationship finds no parallel in this country. Moreover, our courts, and the Federal Rules of Appellate Procedure, have sought to limit the use of mandamus and prohibition for the very purpose of protecting judicial immunity. It is extraordinary, therefore, that the Court today should rely on the use of prerogative writs in England to justify exposing judicial officials in this country to harassing litigation and to subject them to personal liability for money judgments in the form of costs and attorney's fees.

III

The Court suggests that the availability of injunctive relief under § 1983 poses no serious "risk that judges will be harassed and their independence compromised by the threat of having to defend themselves against suits by disgruntled litigants." *Ante*, at 537–538. The reasons advanced for this optimism are that equitable relief will be unavailable unless the plaintiff can show "an inadequate remedy at law and . . . a serious risk of irreparable harm." *Ibid.* Again, this suit refutes the Court's argument. Adequate remedies were expressly available to each of the respondents under state law.[13]

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[13] The Court says that "it may have been impossible for respondents to avail themselves" of other remedies provided by Virginia law. *Ante*, at 542, n. 22. Virginia law, however, provides two specific remedies for alleged unlawful detention. Virginia Code § 8.01–654 (Supp. 1983) provides that a "writ of habeas corpus . . . shall be granted *forthwith* by any circuit

Nor was there any showing in this case of irreparable harm in the absence of injunctive relief. Nevertheless, petitioner was forced to bear the burdens of extended litigation, making clear the need for absolute judicial immunity.[34]

As discussed, both the English common-law cases and the decisions of this Court identify the burdens of harassing litigation, rather than the threat of pecuniary loss, as threatening judicial independence. In suits for injunctive relief, just as in suits for damages, the likely scenario was well stated by one of the justices in *Taaffe* v. *Downes:*

> "[Without the doctrine of judicial immunity, judges] become amenable to every other species of correction by a Court . . . . One hour at the bar—the next at the bench, of the same or some other Court. They would have a busy and harassing time, getting from one station to the other—from the Judge to the accused—from the corrector to the corrected." 13 Eng. Rep., at 20, n. *(a)*.

The ever-present threat of burdensome litigation, made realistic by today's decision, may well influence judicial determinations, particularly in close cases where the decision is likely to be unpopular.

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court" to any person who shows there is probable cause to believe he is being unlawfully detained (emphasis added). Moreover, Virginia Code § 19.2-124 (1983) provides a specific procedure for appealing unreasonable bail determinations "successively to the next higher court . . . up to and including the Supreme Court of Virginia." The Court suggests that in view of the short duration of pretrial detention here, these remedies may not have been available. There has been no showing to this effect. In any event, *Stump* v. *Sparkman*, 435 U. S. 349 (1978), indicates that judicial immunity does not depend upon the availability of other remedies.

[34] Responding to this dissent, the Court states that there has been no showing of unavailability of alternative remedies because petitioner never challenged the injunctive relief awarded. *Ante*, at 542, n. 22. The point, however, is that this suit for injunctive relief was allowed to proceed against a judicial official without a showing, or finding by the District Court, that alternative remedies were unavailable, or that there would be irreparable harm.

Suits for injunctive relief may pose even greater threats to judicial independence if they are successful and an injunction is ordered. The specter of contempt proceedings for alleged violations of injunctive orders is likely to inhibit unbiased judicial decisionmaking as much as the threat of liability for damages. Again, this suit is a case in point. The injunctive order entered here was of unlimited duration and enjoined petitioner from authorizing the pretrial detention of any person charged with a certain class of misdemeanor, *unless* that person was "lawfully deemed likely to be a danger to himself or to others," and "only so long as such danger persists." App. 22. Whether a particular defendant is "likely to be a danger to himself or to others" and how "long [that danger will] last" are questions normally and necessarily left to the discretion of the presiding judge. The threat of contempt—with the possibility of a fine or even imprisonment—could well deter even the most courageous judge from exercising this discretion independently and free from intimidation.[15]

Finally, harassing ~~litigation and its~~ potential for intimidation increases in suits where the prevailing plaintiff is entitled to attorney's fees. Perhaps for understandable reasons, the Court's opinion passes lightly over the effect of § 1988. In fact, that provision has become a major additional source of litigation. Since its enactment in 1976, suits against state officials under § 1983 have increased geometrically.[16] Congress enacted § 1988 for the specific purpose of facilitating and encouraging citizens of limited means to obtain counsel to pursue § 1983 remedies. But §§ 1983 and 1988 are available regardless of the financial ability of a plaintiff to engage private counsel. The lure of substantial fee awards,[17] now routinely made to prevailing § 1983 plaintiffs, assures that lawyers will not be reluctant to recommend and press these suits.[18] The Court again ignores reality when it suggests that the availability of injunctive relief under § 1983, combined with the prospect of attorney's fees under § 1988, poses no serious threat of harassing litigation with its potentially adverse consequences for judicial independence.

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[15] The Court states that "[n]o judgment calls are required in following the court's [injunctive] order that petitioner no longer impose bond for offenses for which no incarceration is authorized by statute." *Ante*, at 542, n. 22. This statement is inaccurate. The Virginia statute (now repealed) under which respondents' bail was set permitted jail time for nonincarcerable offenses if the magistrate determined that the arrestee posed a danger to himself or to others. The determination of dangerousness, of course, requires a "judgment call" by the judicial official. By enjoining petitioner from authorizing pretrial detention for arrestees charged with nonincarcerable offenses "solely because they cannot meet bond," the District Court's order threatened mistaken "judgment calls" with contempt proceedings. Injunctive relief often will limit a judicial officer's discretion by increasing the risk of contempt.

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[16] Civil rights cases accounted for 8.3% of the total civil litigation in the Federal District Courts for the 12 months ended June 30, 1982, and in 1982 civil rights suits filed by state prisoners against state officials had increased 115.6% over the number of similar suits filed in 1977 before the prospect of a fee award under § 1988 became an added incentive to § 1983 claims. Annual Report of the Director of the Administrative Office of the United States Courts 100–103 (1982).

[17] Recent fee awards under § 1988 have increased with the precipitous rise in hourly rates. In *Blum* v. *Stenson*, 465 U. S. 886 (1984), for example, hourly rates of $95 to $105 for second- and third-year associates were found to be the "prevailing rates" in the community. Indeed, large fee awards recently have been awarded against state-court judges. See, *e. g.*, *Morrison* v. *Ayoob*, No. 78–267 (WD Pa. 1983) (fees of $17,412 and $5,075 awarded against state-court judges in suit for injunctive and declaratory relief), aff'd, 727 F. 2d 1100 (CA3), rehearing denied, 728 F. 2d 176 (1984), cert. denied, *post*, p. 973.

[18] Nor, as this case illustrates, do the burdens of litigation necessarily end when a district court approves a fee as reasonable. The Court's decision makes it likely that a request for an additional fee will be made for services rendered in the Court of Appeals and this Court. Such a request could result in ongoing litigation. Regrettably, disputes over the reasonableness of § 1988 fee awards often become the major issue in the entire litigation. This is demonstrated by the fact that two attorney's fees cases have been litigated in this Court in successive Terms. *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983); *Blum* v. *Stenson*, *supra*. See also *Copeland* v. *Marshall*, 205 U. S. App. D. C. 390, 641 F. 2d 880 (1980) (en banc); *National Assn. of Concerned Veterans* v. *Secretary of Defense*, 219 U. S. App. D. C. 94, 675 F. 2d 1319 (1982). Moreover, work on fee petitions may be compensated at higher hourly rates than work on the merits. See, *e. g.*, *Morrison* v. *Ayoob*, *supra* (hourly rates of $40 and $75 awarded to legal services firm that initially prosecuted the § 1983 claim; fees of $45 and $110 awarded to private firm hired to prepare and litigate the fee petition).

IV

In sum, I see no principled reason why judicial immunity should bar suits for damages but not for prospective injunctive relief. The fundamental rationale for providing this protection to the judicial office—articulated in the English cases and repeated in decisions of this Court—applies equally to both types of asserted relief. The underlying principle, vital to the rule of law, is assurance of judicial detachment and independence. Nor is the Court's decision today in the broader public interest that the doctrine of absolute immunity is intended to serve. *Bradley*, 13 Wall., at 349.

Senator HEFLIN. Justice Weisberger, we are delighted to see you. Continue, if you would.

STATEMENT OF HON. JOSEPH R. WEISBERGER, ASSOCIATE JUSTICE, SUPREME COURT OF RHODE ISLAND, PROVIDENCE, RI, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Justice WEISBERGER. I am delighted to be here, Senator Heflin, Senator Thurmond.

To begin, Mr. Chairman, I would certainly adopt the very eloquent summation of the purpose of S. 590 made by you as an opening statement and also by Senator Thurmond. I think you have very well expressed the rationale behind the legislation, the need and the purpose of it.

I had intended to limit my testimony, both written and oral, to addressing the concerns that had been expressed in the minority report of the Judiciary Committee which reported out S. 1515 favorably. One of those concerns, of course, was that there was no showing that there was, let us say, a plethora of injunctions being issued against State judges that would affect their independence.

As you will see when you peruse the report of the National Center for State Courts as well as my own testimony, that about 1,800 cases have been brought against State judges, the vast majority of them for judicial acts. Some of them are so vague and difficult to discern that it is impossible to tell whether it is judicial or administrative functions which are challenged.

There is no question that injunctions have not frequently been issued, but that, of course, is because the State judges have not been depriving nor have they ever in any great numbers been depriving litigants of their constitutional rights or their statutory rights.

What happens is that baseless suits are being brought, vexatious litigation is being brought, and from the time of Lord Cook through Justice Field in *Bradley* v. *Fisher*, which you quoted, right down to *Pierson* v. *Ray*, the fear was not the judges would lose litigation, whether damage or otherwise, but that they would be harassed by litigation under which they would eventually be vindicated, but that this type of harassing litigation would distract them from their duties at the clear cutting edge of litigation.

But what I thought I would do in the 3 or 4 minutes that I have is to tell you a story, a story about a judge against whom a decision was wrongfully made by a Federal district judge in New York.

The judge who is the hero or the victim of the story is a State judge named Morton, in the county of Genesee, NY. Judge Morton was given jurisdiction over felony cases, though he was a county judge, and had before him a very serious case involving four counts of murder, together with a count of rape and burglary and several other less serious offenses.

During the course of the litigation, the district attorney indicated that he would be introducing a confession and certain oral statements, as well as some real evidence, physical evidence. There was a motion to suppress. Both the district attorney and the attorney for the defense requested that this hearing be closed to the press and to the public, on the theory that if the evidence was suppressed and the newspapers published what had been suppressed, it would be very difficult in this rural area to empanel a jury thereafter.

The judge granted the closure order, with the proviso that as soon as the trial had been completed or the defendant was not in jeopardy, that a transcript would be made available to the public and, of course, to the press. This decision was made in January 1985. In September of that same year, the newspaper, Johnson Newspaper Publishing Co., d/b/a the Batavia News, brought action against Judge Morton in the Federal district court, seeking injunctive relief, not only enjoining him from enforcing his order of closure and requiring him to make a transcript immediately available, but also requiring him in future cases not to issue such orders.

Well, the Federal district judge considered this matter. In the meanwhile, in October 1985, the defendant was sentenced, he pleaded and he was sentenced, his case was over. The judge immediately made the transcript available to the press and the public. The case is still pending in the Federal court.

There is a motion for summary judgment and also a motion to dismiss on the ground of mootness. The Federal district judge denied the dismissal on the ground of mootness, because he said this might be capable of repetition and yet evade review. He held it under advisement for 2 years—2 years. At the end of that time, the Supreme Court of the United States decided a couple of cases, *Press Enterprise II*, so-called, in which they had set out guidelines for the California Supreme Court to close preliminary hearings as they are held in California, and certain articulable findings had to be made.

Well, the Federal district judge, applying the standards of *Press Enterprise II*, which had been decided 1½ years after Judge Morton had made his decision, issued a declaratory judgment against him. Luckily, even the Federal district judge recognized the inappropriateness of injunctive relief, but he issued a declaratory judgment that the judge's actions were unconstitutional and then invited the Johnson Newspaper Corp. to seek counsel fees against the judge.

Well, luckily, the judge appealed and the second circuit reversed the district judge, saying that it was absolutely inappropriate to apply standards that had been elucidated by the Supreme Court 1½ years after the decision to a conscientious attempt on the part of a trial judge to carry out his responsibilities.

Now, this is simply illustrative, this illustration could probably be multiplied many fold, but this is illustrative of a judge who was in the middle, not just of two contending bodies, but in this instance three, and in the criminal process now it is not unusual that a judge will have before him or her not only the defendant and the prosecutor, but it may have two or three media representatives, and if it is a well-publicized case, perhaps a dozen.

Now, here this judge is being battered from all sides with cogent arguments, with vehement arguments, and if the judge makes a decision which is conscientious, based upon the law as it exists at the time that he makes the decision, he runs the risk of being sued and later on having someone with 20/20 hindsight either enjoin him or issue a declaratory judgment accompanied by counsel fees.

Now, this is simply an illustration. I did point out in my testimony that some counsel fees against State officers, not judges, in this case policemen, have amounted to as much as $245,000—*City of Riverside* v. *Rivera*. This is the kind of thing that judges are legitimately fearful of encountering.

On behalf of the American Bar Association and the Conference of Appellate Judges, which I represent, we wish again to express our enthusiastic support of S. 590, of your efforts, Mr. Chairman, and your efforts, Senator Thurmond, to pass this critically needed legislation, not for our benefit, because I am coming to the close of my judicial career, but for the benefit of the people of this country, where more than 98 percent of all litigation takes place in the State courts.

Thank you very much for this opportunity.

[Justice Weisberger's submissions for the record follows:]

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STATEMENT OF

JUSTICE JOSEPH R. WEISBERGER
JUDGE PHILLIP J. ROTH

of the

AMERICAN BAR ASSOCIATION

before the

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICES

of the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

on the subject of

JUDICIAL IMMUNITY -- S. 590

OCTOBER 25, 1989
WASHINGTON, D.C.

Mr. Chairman and Members of the Committee:

My name is Joseph R. Weisberger. I am a justice of the Supreme Court of Rhode Island and former Chairman of the Appellate Judges Conference of the Judicial Administration Division of the American Bar Association. I also serve as the Delegate of the Appellate Judges Conference to the Governing Council of the Judicial Administration Division. I am here today with Judge Phillip J. Roth of the Circuit Court of Oregon. Judge Roth presently serves as Chairman of the Judicial Immunity Committee of the Judicial Administration Division.

We appreciate the opportunity to appear today to express the unqualified support of the ABA for S. 590, the Chairman's bill to prohibit injunctive relief, or an award of attorney's fees against a judicial officer for action taken in a judicial capacity.

You will no doubt recall that Judge Roth and I last testified on this issue on behalf of the ABA on February 26, 1988, in favor of S. 1515, the judicial immunity bill then pending before the Senate Judiciary Committee. We referred at that time to a resolution of the American Bar Association, which had been adopted at the mid-winter meeting of the American Bar Association House of Delegates in 1987 in New Orleans. This resolution read as follows:

> "BE IT RESOLVED, That the American Bar Association urges the Congress to amend 42 U.S.C. Sec. 1983 and 42 U.S.C. Sec. 1988 to prohibit the award of injunctive relief, unless a declaratory judgment was ignored, violated or unavailable, and/or counsel fees against any judicial officer for an act committed in his or her capacity as a judicial officer, and not clearly in excess of his or her jurisdiction."

We stated at our prior appearance that S. 1515 would fully implement this ABA policy.

After the hearing before your Subcommittee, the full Judiciary Committee reported favorably S. 1515 and in so doing enunciated all the cogent arguments on behalf of that legislation which the ABA representatives as well as other representatives of judicial organizations such as the Conference of Chief Justices, and the Judicial Conference of the United States, had presented to the Subcommittee on the occasion of its hearing.

Although the Judiciary Committee reported S. 1515 with recommendation of passage, the bill did not come to a vote on the floor of the Senate and the session ended without passage of the measure.

During the present session, S. 590 has been introduced by a number of members of the Judiciary Committee who previously supported S. 1515.

On behalf of the members of the American Bar Association, which consists of nearly 350,000 lawyers, we commend you, Mr. Chairman, and the members of this Subcommittee for your efforts on behalf of this most significant legislation.

We note that S. 590 is in all respects identical with its predecessor S. 1515 save that S. 590 has eliminated a provision contained in S. 1515 which would have required exhaustion of state remedies before a federal court could issue an injunctive or declaratory order against a state judicial officer for an act or omission committed in his or her judicial capacity.

On behalf of the American Bar Association, we express our enthusiastic support for S. 590 in its present form. This proposed legislation would restore to the judges of our country, both state and federal, the independence to carry out their functions without fear of vexatious and harassing lawsuits which may presently be brought against judges pursuant to 42 U.S.C. §1983 and the Bivens doctrine relating to constitutional torts in the federal system.

When I appeared before you in February 1988, I filed with my testimony an article entitled "The Twilight of Judicial Independence --Pulliam v. Allen", which had been published in the 1985 edition of Suffolk University Law Review at 537. In that article, I attempted to set forth all of the landmark opinions regarding judicial immunity from the case of Floyd and Barker, 77 Eng. Rep. 1305 (1607), to Pulliam v. Allen, 466 U.S. 522 (1984). In my testimony I set forth additional arguments based upon the harassing quality and effect of private litigation being brought against judicial officers as a result of their performance of their judicial duties. I do not wish to repeat these arguments at this time, but would attach my previous testimony and also a copy of the law review article to which the Judiciary Committee made reference in its majority report. I do this to emphasize the fact that I reaffirm the arguments and the rationale set forth in these earlier documents and would ask that the Subcommittee again review these prior statements of history and rationale.

Although I am of the opinion that the report of the Judiciary Committee accompanying S. 1515 is overwhelming in its citation of precedent and the marshalling of logic supporting the position taken, I paid close attention to the arguments set forth in the minority report of Senators Metzenbaum, Kennedy and Simon and will address those concerns here today.

Injunctive and Declaratory Relief

Of most concern to these Senators are the provisions of the bill which limit declaratory and injunctive relief. Are these provisions unnecessary to the goal of judicial independence as they suggest? Absolutely not. Barring a federal court from granting injunctive relief against state judges "unless a declaratory decree was violated or declaratory relief was unavailable" is essential to the preservation of judicial immunity. The justification for the restrictions contained in S. 590 is not, as some have suggested, limited to numbers and should not be judged solely on whether there is evidence of widespread abuse in granting of declaratory and injunctive relief by federal courts in civil rights actions against state judges. A purely numerical argument, in whatever form, misses the entire point of the rationale supporting the doctrine of judicial immunity over a period of four centuries.

From Lord Coke through Mr. Justice Field (Bradley v. Fisher) and down to the opinion of Chief Justice Warren in Pierson v. Ray, 386 U.S. 547 (1967) the principle enunciated for the doctrine of judicial immunity was not that unjust decisions would be rendered against members of the judiciary, but to shield the judiciary from vexatious litigation by unsatisfied or disappointed litigants. That there are few reported cases of plaintiffs successfully obtaining injunctive relief against judges for violations of constitutional rights is undoubtedly because there are very few examples of state judges who have genuinely deprived litigants of constitutional rights under circumstances wherein an injunction could be issued.

However, as Justice Field set forth in Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871):

> "If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action."

Justice Field further stated that if a judge could be compelled to answer in a civil action for his judicial acts, his office would be degraded and his usefulness destroyed.

It was not the fear of judges losing such cases which motivated Justice Field and Chief Justice Warren toward protecting them from vexatious litigation, it was the effect of being subjected to harassing lawsuits by disappointed litigants and thus distracted from their principal duties that gave rise to these jurists' support for the doctrine of judicial immunity.

Very few cases have resulted in the granting of injunctive relief, but according to statistics compiled by the National Center for State Courts, since 1984 (the year of the Pulliam decision) approximately 1,813 cases have been brought against judges or magistrates and hearing officers pursuant to 42 U.S.C. §1983. In these cases, at least 1,008 judicial officers were sued in their judicial capacity, 122 were sued in their administrative capacity and 683 complaints were so vague and uncertain that it is impossible to tell in what capacity the judicial officer has been sued. It is interesting to note that in the State of Pennsylvania alone, 381 cases have been brought against judicial officers. Of this number, 92 were sued in their judicial capacities, 13 were sued in administrative capacities, with the remaining 276 cases too vague to determine in which capacity the judicial officer was sued. 42 U.S.C. §1983 Litigation Against Judges; 1988 Survey Results, National Center For State Courts, Phillip A. Lattimore, III, Staff Attorney. I have obviously not analyzed each of these cases, but I am able to give a few examples from my own experience.

I am now in my thirty-fourth year as a member of the Rhode Island judiciary. I served for 22 years as a justice of the Superior Court of Rhode Island (six of those years as Presiding Justice) and am currently in my twelfth year as a justice of the Supreme Court of Rhode Island. In all that time I was never named as a defendant in a lawsuit until after Pulliam. Since that time, members of the Supreme Court of Rhode Island have been sued in the Federal District Court on three occasions.

The first suit was brought by an attorney who had been disbarred for misconduct. Because the members of the Rhode Island Federal District Court all disqualified themselves, this action was transferred to the District of New Hampshire. It was necessary for counsel to defend the court in that district. It was obvious from the first that this action was not properly brought in a federal district court, since the disbarment of this attorney was the final decision of the highest court of a state and was reviewable only by a petition for certiorari to the Supreme Court of the United States. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). Nevertheless, the action dragged on before the Federal District Court of New Hampshire for several months before it was dismissed, requiring the energies of counsel in the writing of memoranda, travel, and other activities to bring about the conclusion of this litigation.

Some years later, the Supreme Court of Rhode Island issued an opinion in a product liability case which essentially held that Corning Glassware was not unreasonably dangerous as a matter of law under the Rhode Island product liability doctrine and that therefore this issue was improperly submitted to the jury. We remanded the case to the trial justice on the ground that he should initially have granted a directed verdict for the defendant on the product liability count. As a result of this decision, action was brought in the Federal District Court for the District of Rhode Island seeking a stay of the judgment of the Supreme Court of Rhode Island. This case did not even raise an articulable federal question. Nevertheless, the Supreme Court of Rhode Island answered the case utilizing counsel furnished under its policy of insurance. This action was ultimately dismissed with prejudice after exchange of memoranda by counsel.

The third case arose out of a finding by a Family Court justice that a recalcitrant former husband was in contempt for failure to pay alimony awarded to his wife. The Supreme Court of Rhode Island affirmed the judgment of the Family Court. As a result of this action, suit was filed on behalf of the defaulting former husband in the Federal District Court for the District of Rhode Island. Again counsel furnished by the insurance company moved to dismiss on the ground of want of jurisdiction and failure to state a claim upon which relief could be granted on the ground that it was not within the competence of a Federal District Court to review a final decision of the highest court of a state.

These motions were referred to a federal magistrate, who after receiving comprehensive memoranda on behalf of the Supreme Court of Rhode Island dismissed the action some months later for lack of prosecution on the part of plaintiff's counsel who failed to file any responsive memoranda. Both parties appealed the magistrate's decision to the district judge. The plaintiff appealed on the ground that he was not allowed to file a memorandum several months out of time and the Rhode Island Supreme Court on the ground that it desired a decision to be rendered on the jurisdiction issue. This case is still pending.

Chief Justice Peterson who appeared before you previously on behalf of the Conference of Chief Justices also was the subject of a lawsuit in a Federal District in Oregon relating to the determination of fees to be awarded counsel for indigent prisoners. This suit was ultimately dismissed on grounds of abstention, although it probably was not within the jurisdiction of the district court to determine. The case was ultimately dismissed, but not before a preliminary injunction had been issued against Chief Justice Peterson by the federal district judge and many months of travail had been encountered by the Chief Justice and members of the Oregon judiciary.

The foregoing examples are illustrative of the harassment which state judges must undergo when they are sued in federal court even with no reasonable prospect of success.

Attorneys Fees

The ABA strongly favors limiting the liability of judges for attorney's fees under 18 U.S.C. §1988 for acts taken in their judicial capacity. The potential of a substantial attorney's fee assessment as a part of the relief which may be granted in a civil action against a judge also has a significant chilling effect upon the exercise of the judicial function. Attorney's fees which have been granted against state officers have often been in very large amounts. We are all familiar with the $43,000 fee which was assessed against Gladys Pulliam. In City of Riverside v. Rivera, 477 U.S. 561 (1986) a fee award against police officers of seven times the amount of damages was upheld, although this award amounted to the enormous sum of $245,456.25 (compensatory and punitive damages amounted to $33,350).

The spectre of such a fee award is certainly as threatening to an independent judiciary as would be an action for damages.

It has been proposed that a judge's employer (either state or municipality) should accept liability for such attorney's fee awards. We suggest that this is certainly not to be considered a strong buttress to judicial independence. In the first instance even a municipality is not liable for either damages or attorney's fees assessed against a judicial officer unless that judicial officer has been found to be carrying out a policy or custom approved and adopted by the employer. In short, there is no doctrine of respondeat superior in §1983 cases. Monell v. Department of Social Services, 436 U.S. 658 (1978).

A state may also resist payment of an award assessed against a state officer on Eleventh Amendment grounds Kentucky v. Graham, 473 U.S. 159 (1985).

We agree that under Missouri v. Jenkins, 57 L.W. 4735 (June 19, 1989) the Supreme Court held that the Eleventh Amendment has no application to an award of attorney's fees ancillary to a grant of prospective relief against a state. However, for the state to be responsible for such an award, the injunctive relief or declaratory judgment would of necessity be granted against the state itself or against a state officer who was acting in his or her official capacity in carrying out a state law, policy or custom. If the state judge were merely wrong in his or her interpretation of a federal constitutional right or, indeed, a statutory right, that judge could not demand with any hope of success indemnification by the state save on a voluntary basis. On this subject, it should be noted that in Kentucky v. Graham, supra, the state was unwilling to indemnify the officers in question.

It is also true that many state judges have procured insurance, often at their own expense, sometimes at state expense. These homeopathic remedies, while helpful, still do not guarantee judicial independence. Significant awards of attorney's fees (like awards of damages in other contexts) lead to increase in premiums so that ultimately the expense must be borne by the insured. In case the state is the payer of the premium, legislative bodies may well resist the payment of increased premiums. The point is, however, that whether an award of attorney's fees is paid by a judge's employer or insurance company, one cannot minimize the chilling effect of such an award on the traditional independence of judicial decisionmaking.

We submit that the approach in S. 590 of eliminating a judge's liability for attorney's fees and the availability of injunctive relief against a state judge except in certain circumstances is designed to restore the judicial independence which has been the bulwark of our liberties for the entire history of this federal republic.

I would note that we have in every state system at the present time the most elaborate appellate remedies ever known in the history of mankind. Moreover, in every state we have disciplinary procedures which may be invoked without cost against a judge who fails to carry out his or her duties and ethical obligations. In the light of these guarantees of proper judicial performance, it would seem unnecessary and even highly inappropriate to add the remedy of a civil suit for injunction accompanied by open-ended counsel fees to be awarded.

Conclusion

As I pointed out earlier in appearing before this Subcommittee, state courts are responsible for the conduct of more than 95% of all litigation, both civil and criminal which takes place in this country. These figures are supported by irrefutable statistics quoted by Justice Sandra Day O'Connor in a recent article in Intergovernmental Perspective (Summer of 1989, Vol. 15, No. 3, Page 8) entitled "Our Judicial Federalism." Citing statistics from the National Center For State Courts and the Administrative Office of the United States Courts, she pointed out that in 1987, more than 16,000,000 civil suits and more than 11,000,000 criminal actions (excluding juvenile and traffic charges) were filed in the 50-state-court systems and the District of Columbia. By comparison 233,292 civil and 44,335 criminal actions were filed in the federal courts that year.

As the President of the United States begins an ambitious and far reaching program for the enforcement of federal and state laws against drugs, it must be apparent that courts -- and state courts in particular -- will bear the brunt of the overwhelming preponderance of such drug prosecutions. In order to carry this burden as well as the overwhelming proportion of all other types of litigation, the independence of the judiciary is an absolute essential. Distractions by vexatious lawsuits, whether by criminal or civil litigants can only impede the efforts of conscientious state and federal judicial officers to perform the duties imposed upon them by law.

As we have seen in other countries, malefactors and lawbreakers are the only ones who profit when the members of the judiciary are reduced to quivering timidity for fear of personal consequences of courageous decisions.

The restoration of judicial immunity is an essential bulwark for the protection of judicial officers to whom these weighty tasks have been assigned.

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SUPPLEMENTAL STATEMENT OF JOSEPH R. WEISBERGER IN SUPPORT OF S. 590 TO BE PRESENTED TO THE SUBCOMMITTEE CHAIRED BY SENATOR HEFLIN ON ADMINISTRATION AND THE COURTS.

Mr. Chairman and Members of the Subcommittee:

I submit herewith an opinion of the Court of Appeals of the Second Circuit decided November 29, 1988 in the case of Johnson Newspaper Corporation d/b/a The Batavia Daily News v. The Honorable Glenn R. Morton, Judge of the County Court of the County of Genesee, 862 F. 2d 25 (2nd Cir. 1988) as illustrative of harassing litigation even in a circumstance when the judicial officer is ultimately vindicated.

In the case submitted, Judge Morton, a New York State judge with jurisdiction to try felony cases had before him a very serious case involving multiple counts including four counts of second degree murder. At the pretrial stage counsel for the defendant and the District Attorney joined in a motion to close a suppression hearing relating to oral and written statements as well as an item of physical evidence to the press and public. A representative of Johnson Newspaper Corporation opposed the motion for closure. Judge Morton, believing that publicity concerning this pretrial hearing would adversely affect the defendant's right to a fair trial granted the motion for closure, but directed the transcripts of the proceeding be made available to the news media upon completion of the trial or at such other time as the defendant would no longer be in jeopardy. The hearing on closure took place January 29, 1985 and the decision granting closure was issued January 31, 1985.

Johnson Newspaper Corporation did not seek appellate review of Judge Morton's decision, but on September 19, 1985 brought an action against Judge Morton in the Federal District Court for the Western District of New York against Judge Morton pursuant to 42 U.S.C. 1983 for violations of its rights under the First and Fourteenth Amendments. The newspaper sought ~~the~~ following relief: (1) declaring the closure determination violative of the First Amendment; (2) enjoining Judge Morton from enforcing the closure order and directing him to vacate the order; (3) directing Judge Morton to provide it with a complete transcript of the suppression hearing; and (4) requiring that in regard to any future closure of pretrial proceedings, Judge Morton (a) "issue articulated findings" regarding the adequacy of closure alternatives, particularly change of trial venue, and (b) refrain from ordering closure unless it is shown to be the least restrictive remedy.

After the action had been brought in the Federal District Court, the criminal case was concluded by a negotiated plea and the imposition of sentence on October 21, 1985. At that time copies of the suppression hearing transcript were made available to the public and the press. Judge Morton moved to dismiss the complaint on December 20, 1985. The newspaper moved for summary judgment on January 16, 1986 and on March 4, 1988 (approximately two years after the matter was taken under advisement) the District Court filed an unpublished memorandum and order denying the motion to dismiss the complaint and granting summary judgment "declaring Judge Morton's action unconstitutional" and ordering that the newspaper should recover from the defendant judge its necessary costs and reasonable counsel fees. This declaration was based upon the fact that Judge Morton did not articulate specific findings which were mandated by the Supreme Court in Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) Press Enterprise II rendered approximately a year and one-half after Judge Morton's closure order. Until that case no such requirement in respect to a preliminary hearing had been elucidated.

In reversing the judgment of the District Court, the Court of Appeals pointed out that at the time of Judge Morton's order the question of the right of the press to attend a preliminary hearing was in an unsettled state. The Second Circuit also pointed out that it took two cases for the Supreme Court of California to be instructed by the Supreme Court of the United States concerning the right of the press to attend a preliminary hearing as it is conducted in the State of California. The Second Circuit commented that "Judge Morton's failure to make specific findings " a criticism available only as a matter of hindsight after Press-Enterprise II cannot under the circumstances form the basis for a declaratory judgment against him for violation of a constitutional right. The Court of Appeals went on to state that there was no indication whatsoever that Judge Morton would not in the future apply the specific findings requirement established by the Supreme Court of the United States and by a decision of the New

York Court of Appeals, In re The Associated Press v. Beil, 70 N.Y.2d 32, 517 N.Y.S. 2d 444, 510 N.E.2d 313 (1987) which also "post-dated Judge Morton's conscientious and thoughtful opinion. That opinion should have been accorded the same respect by the District Court as it would have been accorded by the New York Court of Appeals under similar circumstances."

This case illustrates the fact that a state judge who has made a conscientious determination in the opinion of the Court of Appeals of the Second Circuit was subject to harassment and uncertainty from 1985 until 1988 in respect to litigation which should never have been brought in the first instance. The judge's only redress was vindication. He was not entitled to counsel fee or other compensation from the newspaper which had wrongfully accused him of violation of its First Amendment Rights.

This is only one example of many that might be presented of the vexatiousness of allowing lawsuits to be brought against a judicial officer not only by disappointed litigants, but by a third-party newspaper which intruded itself into a criminal proceeding. This is the kind of action which Pulliam has made possible at the option not of a responsible government agency but any litigant who chooses to avail itself of the right to bring a complaint in a Federal District Court.

2. *Quinones's Appeal*

Appellant Quinones challenges his sentence of five years' imprisonment and six years' supervised release, claiming that Judge Bartels employed an impermissibly "fixed and mechanical approach" to sentencing as evidenced in his stating, *inter alia,* that "we cannot have any drug case where we give probation." *See United States v. Schwarz,* 500 F.2d 1350, 1352 (2d Cir.1974). We decline to upset Quinones's sentence of imprisonment, however, although we delete his term of supervised release.[4] The seemingly rigid language used by the district judge occurred after defense counsel had made an argument that tended to underplay the seriousness of Quinones's offense. We decline to give the judge's statements literal meaning. Judge Bartels showed flexibility in his sentencing, giving widely varying terms to the various defendants. We believe his remarks must be read in the context of the facts of this case, which involved a widespread and serious conspiracy involving heroin. Quinones has offered us no reason to separate these remarks from the factual context in which they were made or to believe that probation should have been given serious consideration in his case.

We therefore reverse and remand all appeals but that of Quinones, which we affirm.

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cert. denied, 446 U.S. 940, 100 S.Ct. 2163, 64 L.Ed.2d 795 (1980)). Hernandez thus cannot show the "substantial prejudice" required by *United States v. Barlin,* 686 F.2d 81, 89 (2d Cir.1982).

[4] Although appellant Quinones has not raised the issue, the government has conceded that supervised release is not available for conspiracy counts under 21 U.S.C. § 846. Government Br. at 62 n. 15.

JOHNSON NEWSPAPER CORPORATION d/b/a The Batavia News, Plaintiff-Appellee,

v.

The Hon. Glenn R. MORTON, Judge of the County Court of the County of Genesee, Defendant-Appellant.

No. 1328, Docket 88-7283.

United States Court of Appeals, Second Circuit.

Argued Aug. 18, 1988.

Decided Nov. 29, 1988.

Newspaper brought suit seeking a judgment declaring a state court judge's closure of a pretrial suppression hearing violative of the First Amendment. The United States District Court for the Western District of New York, John T. Elfvin, J., entered judgment in favor of newspaper, and appeal was taken. The Court of Appeals, Miner, Circuit Judge, held that action was rendered moot when transcript of suppression hearing became available to the media within a month after action was commenced.

Reversed and remanded.

1. Federal Courts 🔑723

Once a challenged order expires and becomes moot, a reviewing court retains jurisdiction only when the dispute is one capable of repetition yet escapes review because the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and there was a reasonable expectation that the same complaining party would be subjected to the same action again.

2. Federal Courts 🔑724

Action alleging that state court judge's closure of pretrial suppression hearing violated the First Amendment was moot, where transcript of hearing became available to the media within a month after action was commenced; moreover, exception to mootness doctrine for a dispute capable of repetition yet escaping review did not apply because there was no reasonable expectation that the same complaining party would be subjected to the same action again. U.S.C.A. Const.Amend. 1.

O. Peter Sherwood, Sol. Gen., State of N.Y. (Robert Abrams, Atty. Gen. of the State of N.Y., Peter H. Schiff, Deputy Sol. Gen., William E. Storrs, Asst. Atty. Gen., Albany, N.Y., of counsel), for defendant-appellant.

S. Paul Battaglia, Syracuse, N.Y. (Jonathan B. Fellows, Bond, Schoeneck & King, Syracuse, N.Y., of counsel), for plaintiff-appellee.

Before WINTER and MINER, Circuit Judges, BILLINGS, District Judge.*

MINER, Circuit Judge:

Defendant-appellant The Hon. Glenn R. Morton ("Judge Morton"), Judge of the County Court of the County of Genesee, appeals from a summary judgment entered in the United States District Court for the Western District of New York (Elfvin, J.) declaring that his closure of a pre-trial suppression hearing was unconstitutional and allowing plaintiff to recover against him its reasonable costs and counsel fees. The action was commenced by plaintiff-appellee Johnson Newspaper Corporation d/b/a The Batavia Daily News ("Batavia News") following the issuance by Judge Morton of an order that prevented its news reporters from attending a suppression hearing in a criminal case pending in the Genesee County Court. Because we find that declaratory relief is inappropriate under the circumstances, we reverse and direct the entry of judgment in favor of Judge Morton.

BACKGROUND

This action had its genesis in proceedings in the County Court of Genesee County in a criminal action entitled "The People of the State of New York v. David R. Ferringer." Ferringer was indicted and arraigned on September 26, 1984 for the crimes of assault in the third degree, murder in the second degree (four counts), attempted robbery in the first degree, rape in the first degree, sexual abuse in the first degree, and criminal possession of stolen property in the third degree. There seems to be little doubt that the brutal rape/murder with which Ferringer was charged was a matter of intense public interest and concern in the small upstate New York community in which it occurred. Immediately following his arraignment, therefore, Ferringer applied to Judge Morton by order to show cause for a blanket closure of all evidentiary hearings and other proceedings preliminary to trial; for the sealing of any notices of intent to offer in evidence any statements made by him to the police; and for such other measures as might be necessary to protect him from the effects of prejudicial pre-trial publicity.

After hearing argument of Ferringer's application on September 28, 1984, Judge Morton denied blanket closure as premature and as unsupported by the required showing of necessity. The denial was without prejudice to a reapplication for the closure of specific hearings or proceedings to be scheduled in the future. Any notices of intention to offer statements to be filed by the district attorney were ordered sealed pending further direction of the court or expiration of the time allowed for motions to suppress. Decision was reserved on the balance of the issues presented. Present when Judge Morton orally announced these determinations on September 28 were the District Attorney of Genesee County, Ferringer's attorney, and an attorney representing Batavia News. All had participated in the oral argument.

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* Hon. Franklin S. Billings, Jr., U.S. District Judge, District of Vermont, sitting by designation.

Judge Morton filed a written decision on December 12, 1984 addressing the remainder of the relief sought in the application. He wrote that the issue to be resolved "concerns the protective measures, if any, this court should undertake to discharge its affirmative duty to minimize the possibility of prejudicial pre-trial publicity." Although Judge Morton found that "two regional papers have elected to disclose potentially prejudicial material," he also found that "coverage has subsided together with any expressions of public hostility or demonstrations." He concluded that no further measures to assure Ferringer a fair trial were then necessary, other than a direction that the New York State Police "not release or disclose without the approval of this court the performance or results of any test conducted herein or anticipated testimony of any prospective witness in respect thereto."

On January 25, 1985, Ferringer renewed his closure motion. At that time, after the District Attorney had served a notice of intent to offer statements in evidence and had responded to discovery requests, it appeared that a hearing would be scheduled on Ferringer's motion to suppress specific oral and written statements as well as an item of physical evidence. The closure motion was argued on January 29, 1985 by an assistant district attorney of Genesee County, by the attorney then representing Ferringer and by an attorney from the law firm representing Batavia News. Judge Morton issued his decision and order granting the closure motion on January 31, 1985. The action at bar was spawned by that determination.

In granting closure, Judge Morton found that Ferringer had made "the required showing" of "a strong likelihood that evidence relevant and admissible at the pretrial hearing would prejudice his right to a fair trial if it were prematurely disclosed." Although Judge Morton recognized "that both the press and the public have some qualified right" to attend pre-trial proceedings in criminal cases, he opined that "the extent thereof or the showing of necessity to justify a closure has not been clearly defined." He rejected the suggestion of Batavia News that an expanded voir dire and a change of venue be considered as alternatives to closure, for the reason that "[n]o authority has been submitted which would reflect in any way that such is the remedy of choice ... where only a qualified right is involved." Judge Morton prohibited release of transcripts of the proceedings until "completion of the trial or such other time as the defendant is no longer in jeopardy."

The action at bar was commenced by the filing of a complaint on September 19, 1985, but it was not until October 2, 1985 that the last of the charges against Ferringer was disposed of by a negotiated plea. The criminal proceedings were concluded finally by the imposition of a sentence on October 21, 1985, at which time copies of the suppression hearing transcripts were made available to the public. In this action, brought pursuant to the provisions of 42 U.S.C. § 1983 for violations of its rights under the first and fourteenth amendments, Batavia News sought judgment: (1) declaring the closure determination violative of the first amendment; (2) enjoining Judge Morton from enforcing the closure order and directing him to vacate the order; (3) directing Judge Morton to provide it with a complete transcript of the suppression hearing; and (4) requiring that in regard to any future closure of pretrial proceedings, Judge Morton (a) "issue articulated findings" regarding the adequacy of closure alternatives, particularly change of trial venue, and (b) refrain from ordering closure unless it is shown to be the least restrictive remedy.

A motion by Judge Morton to dismiss the complaint was filed on December 20, 1985; a motion for summary judgment by Batavia News was filed on January 16, 1986; and oral argument on both motions was heard March 20, 1986. On March 4, 1988, approximately two years after the matters were taken under advisement, the district court filed its Memorandum and Order denying the motion to dismiss the complaint and granting summary judgment "declaring Judge Morton's action unconstitutional" and ordering "that the plaintiff may recover from the defendant its necessary costs and a reasonable fee." The district court rejected Judge Morton's arguments urging eleventh amendment immunity, mootness, the abstention doctrine and failure to invoke available state remedies as grounds for dismissal. Finding that the dispute between the parties is "capable of repetition yet will likely evade review in the future," the court gave the following rationale for granting summary declaratory judgment to Batavia News:

> Judge Morton failed to articulate that specific—or any—alternatives to closure had been seriously considered and the reasons why those alternatives had been found wanting. Thus, to the extent that Judge Morton failed to articulate findings adequate to support closure, the decision to close the suppression hearing violated plaintiff's First Amendment rights. Such failure is declared.

DISCUSSION

When Judge Morton issued the closure order in the Ferringer case on January 31, 1985, the public's first amendment right of access to suppression hearings was far from settled. The Supreme Court had applied a first amendment right of access to criminal trials, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), including jury selection, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) ("*Press-Enterprise I*"), but not to pre-trial proceedings. The following test for closure of a criminal trial was established in *Press-Enterprise I:*

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

464 U.S. at 510, 104 S.Ct. at 824.

In *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), the Supreme Court considered whether a defendant's sixth amendment right to an open trial prevented the closure of a hearing to suppress wiretaps and evidence seized as a result of the wiretaps. The Court there held that closure over the defendant's objection would be prohibited unless the party seeking the closed hearing met a test similar to the one established in *Press-Enterprise I* by showing: that there was an overriding interest likely to be prejudiced; that closure was no broader than required to protect that interest; that reasonable alternatives were considered by the court; and that findings adequate to support closure were made by the court. *Id.* at 48, 104 S.Ct. at 2216. The assertion of a first amendment right of access by a newspaper in response to a motion for closure made by the defendant in the criminal proceeding distinguishes the case at bar from *Waller.*

Although there was no Supreme Court decision dealing with a defendant's first amendment right to exclude the public and the press from a pre-trial hearing at the time of Judge Morton's order, there was then extant a decision by a divided panel of this Court dealing with that very issue. In *Application of the Herald Co.*, 734 F.2d 93 (2d Cir.1984), we recognized "that the First Amendment extends *some degree* of public access to a pretrial suppression hearing," *id.* at 99 (emphasis supplied). "Until authoritatively instructed by the Supreme Court," we expressed our "reluctan[ce] to frame a test for closure of a pretrial suppression hearing that incorporates the rigorous First Amendment standards associated with abridgement of free expression." *Id.* at 100. Accordingly, a standard was formulated allowing closure to be ordered "upon a showing of a significant risk of prejudice to the defendant's right to a fair trial or of danger to persons, property, or the integrity of significant activities entitled to confidentiality." *Id.* Our remand in *Herald* required the trial judge to "articulate on the public or sealed record a sufficiently detailed basis for his serious concern about public dissemination risks and for his marked preference for closure over alternative remedies." *Id.* at 103. The panel dissenter rejected the notion of any first amendment right of access to a suppression hearing. *Id.* at 106–07.

Citing in his decision *Waller* as well as *Herald* (referred to therein as *U.S. v. Klepfer*), Judge Morton determined (1) that "some qualified right" to attend pretrial proceedings was vested in the public and the press and (2) that neither the extent of the right nor the showing of necessity required for closure had been defined clearly as a matter of federal law. Accordingly, following what he perceived to be the New York rule, Judge Morton required the defendant to "demonstrate a strong likelihood that evidence relevant and admissible at the pre-trial hearing would prejudice his right to a fair trial if it were prematurely disclosed." Although he made no separate factual findings on the issue, the Judge concluded "that the defendant has made the required showing." Alternative remedies, such as expanded voir dire and change of venue, were rejected.

The definitive answer to the question of a first amendment right of access to pretrial proceedings was not given by the Supreme Court until approximately a year and a half after Judge Morton issued his closure order. It was in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) ("*Press-Enterprise II*"), that the Court was confronted with an order closing a preliminary hearing in a California criminal proceeding on the unopposed motion of the defendant. The California Supreme Court had determined that the right of access to criminal proceedings recognized in *Press-Enterprise I* extended only to criminal trials and therefore that there was no general right of access to preliminary hearings. It had decided that the statute providing for closure of preliminary hearings required only that the defendant establish a reasonable likelihood of substantial prejudice in order to shift the burden to the prosecution or the media seeking an open hearing to show otherwise by a preponderance of the evidence.

In reversing the California Supreme Court, the Court in *Press-Enterprise II* reached the following conclusions: "the qualified First Amendment right of access to criminal proceedings applies to preliminary proceedings as they are conducted in California ...;" "the proceedings cannot be closed unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.' *Press-Enterprise I* ...;" and where the interest to be served is the defendant's right to a fair trial, the specific findings demonstrate "first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial right." 478 U.S. at 13–14, 106 S.Ct. at 2743–44.

The district court below, finding that an injunction would be "intrusive and unworkable," issued a judgment declaring Judge Morton's order violative of the first amendment rights of the Batavia News. According to the Memorandum and Order of the District Court, that judgment is bottomed on Judge Morton's failure to (1) consider alternatives to closure and give reasons for rejecting those alternatives and (2) articulate findings adequate to support closure. As to the first item, it appears that Judge Morton did take into account the alternatives of expanded voir dire and change of venue but rejected them because they were not remedies "of choice" when "only" a qualified right of access was involved and, in the matter of a venue change, because there was no justification for sacrificing a right as important as trial in the prescribed county.

While Judge Morton did not make specific findings justifying closure, he did determine that there was a strong likelihood of prejudice to the right of fair trial in the absence of closure. When he ordered the suppression hearing in the Ferringer case to be closed, there was yet no Supreme Court decision providing the press with a first amendment right of access to a suppression hearing. Although our *Herald* case was available, it was not binding on him as a state judge. We note, however, that our test in *Herald* ("significant risk of prejudice") and the test applied by Judge Morton ("strong likelihood of prejudice") were similar to the one ultimately adopted by the Supreme Court in *Press-Enterprise II* ("reasonable likelihood of substantial prejudice"). Judge Morton's failure to make specific findings, a criticism available only as a matter of hindsight after *Press-Enterprise II*, cannot under the circumstances form the basis for a declaratory judgment against him for violation of a constitutional right. We note that Judge Morton's view of the first amendment right of access to pre-trial criminal proceedings was closer to the test adopted by the Supreme Court in *Press-Enterprise II* than that of the California Supreme Court and much closer than the view of the dissenter in *Herald*.

In any event the action is moot and should have been dismissed by the district court for that reason. The transcript of the hearing became available to Batavia News within a month after the action was commenced. The district court rejected the mootness defense on the ground that the dispute between the parties was capable of repetition but would evade review unless addressed in this case. It determined that "[t]he fact that the plaintiff operates a newspaper creates a reasonable expectation that it may in the future be again subject to such an order [of closure]." The district court erred in its application of the exception to the mootness doctrine.

[1, 2] Once a challenged order expires and becomes moot, as did the order here, a reviewing court retains jurisdiction only when the dispute is one capable of repetition yet escapes review because "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Gannett Co. v. DePasquale*, 443 U.S. 368, 377, 99 S.Ct. 2898, 2904, 61 L.Ed.2d 608 (1979). The second prong of the test has not been met here, because there is no indication whatsoever that Judge Morton will not in the future apply the specific findings requirement established by the Supreme Court in *Press-Enterprise II* and by the New York Court of Appeals in *In re The Associated Press v. Bell*, 70 N.Y.2d 32, 517 N.Y.S.2d 444, 510 N.E.2d 313 (1987), a decision by New York's highest court that also post-dated Judge Morton's conscientious and thoughtful opinion. That opinion should have been accorded the same respect by the district court as it would have been accorded by the New York Court of Appeals under similar circumstances:

> We cannot conclude that the trial court would have followed the procedures which he did or that he would necessarily have reached the same conclusion had our decision ... preceded the hearing. While we can anticipate that the implementation of the principles that we have declared will not always be easy, we have no reason to question the readiness or capacity of the Judges at nisi prius to seek to implement them appropriately with diligence, faithfulness and imagination. We conceive our jurisprudential role in this field as one of supervising and monitoring the dispositions made by our lower courts after we declare the applicable principles, rather than retrospectively appraising conduct of Trial Judges that preceded our declarations.

In re Hearst Corp. v. Clyne, 50 N.Y.2d 707, 716–17, 431 N.Y.S.2d 400, 409 N.E.2d 876 (1980).

CONCLUSION

In accordance with the foregoing, we reverse the judgment of the district court and remand for entry of judgment in favor of defendant-appellant.

THE TWILIGHT OF JUDICIAL INDEPENDENCE—*PULLIAM v. ALLEN*

Joseph R. Weisberger*

Over 375 years ago, in the fifth year of the Reign of James I, Lord Justice Coke held, in *Floyd and Barker*[1], that a judge who presided over a murder trial at the Grand Session in the County of Anglessey was immune from conspiracy charges brought against him in the Court of Star Chamber by the defendant for the judge's conduct in the original action. Lord Coke, in a sweeping declaration, held that regardless of whether a defendant be convicted or acquitted,

> [Y]et the Judge, be he Judge of Assise or a justice of peace, or any other Judge, being Judge by Commission and of record and sworn to justice, cannot be charged for conspiracy, for that which he did openly in Court as Judge or justice of the peace: and the law will not admit any proof against this vehement and violent presumption of law, that a justice sworn to do justice, will do injustice.[2]

Lord Coke stated that judges are accountable only to God and the King, and do not answer to any suggestion in the Star Chamber; "for this would tend to the scandal and subversion of all justice."[3]

This ringing affirmation of judicial immunity came at a time when the notion of judicial independence was articulated for the first time even against the king himself.[4] Although Lord Coke believed the judiciary did not act under the direct supervision of the crown, King James viewed such a bold assertion with disfavor.[5] Prior to this confrontation between Coke and James I in 1610, the prevailing view espoused by the King and his most important ministers was that Judges, like other civil servants, were merely officers of the Crown.[6]

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[1] 77 Eng. Rep. 1305 (1607).

[2] *Id.* at 1306.

[3] *Id.* at 1307.

[4] It was during the reign of James I that the issuance of writs of prohibition by the common law courts was called into question as an interference with the King's prerogative. All of the judges of the common law courts were called before the King after a writ of prohibition had been issued against the Court of High Commission (an ecclesiastical court). Archbishop Bancroft argued to the King that judges were but delegates of the King and that the monarch might at any time withdraw a case from the courts and decide it himself. Coke, who was the Lord Chief Justice of the Court of King's Bench, took issue with this view and stated, "The King in his own person cannot adjudge any case either criminal . . . or betwixt party and party. The King cannot take any cause out of any courts and give judgment upon it himself . . . and the judges are sworn to execute justice according to the law and constitution of England." The King responded to this radical assertion by asking in effect, "Does this mean that I shall be under the law, which it is treason to affirm?" To this question question Coke answered with the famous phrase, "Bracton sayeth, quod Rex non debet esse sub homine, sed sub Deo et lege." The King responded with high indignation and offered to strike Coke

Consequently, when referring to the early common law method of review of judicial decisions as personal actions against judges,[7] it must be remembered that at that time, judges had not yet assumed the role which is recognizable today.[8] Indeed, even in Lord Coke's day, the judiciary had achieved a modicum of immunity and independence necessary to defeat a personal action. By the mid-Fourteenth Century, the doctrine of judicial immunity had emerged to the extent where a judge acting within his jurisdiction was not subject to personal liability for his actions.[9] Lord Edward Coke reinforced this doctrine in the cases of *Marshalsea*[10] and *Floyd and Barker*.[11] From that time forward, in an unbroken line of decisions, both English and American courts reaffirmed and respected the doctrine of judicial immunity until the United States Supreme Court's decision in *Pulliam v. Allen*.[12] This article will examine the earlier decisions and analyze the effect of *Pulliam v. Allen* on both the doctrines of judicial independence and judicial immunity.

I. THE EARLY AMERICAN CASES

Chief Justice Kent of the Supreme Court of New York, one of the most respected judges in the early development of the state judiciary, enunciated the doctrine of judicial immunity in the landmark case of *Yates v. Lansing*.[13] American courts have followed this doctrine for nearly a century and three quarters. In the original case,

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who then fell abjectly upon his knees. 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 429-31 (2d ed. 1937).

[5] *See* C. BOWEN, THE LION AND THE THRONE 378-79 (1957) (discussing friction between Lord Coke and King James).

[6] 5 W. HOLDSWORTH, *supra* note 4, at 428.

[7] 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 668 (2d ed. 1899).

[8] It should be noted that it was not until the Act of Settlement 12 and 13 William III (1701) that judges were given tenure independent of the King during good behavior. In fact, Coke was dismissed by James I from the Office of Chief Justice of the Court of King's Bench on November 14, 1616. 5 W. HOLDSWORTH, *supra* note 4, at 440.

[9] The doctrine seems to have been established at least during the reign of Edward III (1326-1377). 6 W. HOLDSWORTH, *supra* note 4, at 235.

[10] 77 Eng. Rep. 1027 (1610).

[11] 77 Eng. Rep. 1305 (1607).

[12] 104 S. Ct. 1970 (1984).

[13] 5 Johns. 282 (N.Y. Sup. Ct. 1810), *aff'd*, 9 Johns. 395 (N.Y. 1811).

In re Yates,[14] John Yates was arrested for malpractice and contempt, upon a writ issued by Chancellor John Lansing, Jr. Shortly after his arrest, Yates obtained a writ of habeas corpus from a justice of the Supreme Court of New York discharging him from custody. Thereafter, Chancellor Lansing ordered Yates recommitted, holding the single justice's discharge invalid. The Supreme Court of New York subsequently held the Chancellor's order of recommittal valid and the single justice's discharge invalid. On further review, a higher appellate court reversed.[15]

Yates brought an action against Lansing for recovery of a penalty authorized by statute. Lansing interposed the defense of judicial immunity. In his Supreme Court opinion, Kent cited an exhaustive list of English authorities from the yearbooks, down to the early decisions of Lord Coke, as well as more recent decisions by Lord Mansfield.[16] In his opinion, Kent concluded by stating the policy underlying judicial immunity:

> No man can foresee the disastrous consequences of a precedent in favor of such a suit. Whenever we subject the established courts of the land to the degradation of private prosecution, we subdue their independence, and destroy their authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample on everything sacred in society and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty.[17] This unequivocal declaration of judicial immunity as an essential buttress to judicial independence formed the basis for later American decisions.

The Supreme Court of the United States first considered the subject of judicial immunity in *Randall v. Brigham*.[18] In *Randall*, a superior court justice of the Commonwealth of Massachusetts disbarred Randall, an attorney, because of his allegedly unprofessional conduct in wrongfully retaining his client's civil war enlistment money.[19] Thereafter, Randall brought action in the Federal Circuit Court for the District of Massachusetts against the Massachusetts Superior Court judge who removed him from the bar. Mr. Justice Field affirmed the circuit court's judgment in favor of the defendant on the basis of judicial immunity. He cited English precedent, including *Floyd's and Barker's* case, as well as the more recent case of *Taaffe v. Downes.*[20] In *Taaffe*, the Irish Court of Common Pleas asserted that a diminution of judicial immunity,

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[14] 4 Johns. 317 (N.Y. Sup. Ct. 1809), *rev'd sub nom.* Yates v. People, 6 Johns. 337 (N.Y. 1810).

[15] Yates v. People, 6 Johns. 337, 338 (N.Y. 1810).

[16] Yates v. Lansing, 5 Johns. 282, 291-95 (N.Y. Sup. Ct. 1810) (discussing settled principle that judge not subject to civil suit), *aff'd*, 9 Johns. 395 (N.Y. 1811).

[17] *Id.* at 298.

[18] 74 U.S. (7 Wall.) 523 (1868).

[19] *Id.* at 526. The plaintiff, Randall, had represented one Leighton who was accused of larceny. *Id.* at 524. Leighton agreed to enlist in the navy if the prosecutor dropped the larceny charges. *Id.* Although the prosecutor never agreed to this, Randall became a surety for Leighton, who, upon his release, proceeded to Randall's office where he signed an agreement to enlist as a substitute for one Brown, of Lowell, for four hundred dollars. *Id.* This sum was retained

> [W]ould poison the very source of justice, and introduce a system of servility, utterly inconsistent with the constitutional independence of the Judges,—an independence which it has been the work of ages to establish, and would be utterly inconsistent with the preservation of the rights and liberties of the subject.[21]

Justice Field then cited Chief Justice Kent's elaborate opinion in *Yates v. Lansing*,[22] concluding that because the superior court judge had jurisdiction to entertain the case for removal, he was protected by the doctrine of judicial immunity.[23]

Three years after the *Randall* decision, the Supreme Court of the United States decided the landmark case of *Bradley v. Fisher.*[24] This

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by Randall as indemnity for his becoming a surety on the recognizance, and also to pay the plaintiff four hundred dollars for furnishing bail. *Id.*

Leighton subsequently enlisted in the navy as a substitute for Brown, who paid the plaintiff, for enlistment, eight hundred and thirty dollars. *Id.* Of this sum, the plaintiff gave Leighton ten dollars when he boarded his assigned ship. *Id.* Although Leighton later received an additional one hundred dollars, Randall retained the balance. *Id.*

Several weeks later, Leighton wrote to the captain of his ship a letter explaining that he was promised four hundred dollars for his enlistment by his lawyer, Randall, and received only ten dollars. *Id.* at 525. The ship captain forwarded the letter to the grand jury presiding at Leighton's case. *Id.* After the letter was brought to the attention of Justice Brigham, the court summoned Randall. *Id.*

The Court concluded that Randall had taken advantage of Leighton, whereupon Randall was disbarred. *Id.* at 525-26. Randall then sued the superior court judge alleging his removal had been made arbitrarily and without lawful authority. *Id.*

[20] *Id.* at 536-37; *see* Taaffe v. Downes, 13 Eng. Rep. 15 *passim* (1813) (discussing judicial immunity).

[21] Taaffe v. Downes, 13 Eng. Rep. 15, 23-24 (1813). In *Taaffe*, the plaintiff brought an action for assault and false imprisonment against the judge who issued a writ for his arrest. *Id.* at 15. Because the judge's act was a judicial act, no suit could be brought. *Id.*

[22] Randall v. Brigham, 74 U.S. (7 Wall.) 523, 538-39 (1868) (citing Yates v. Lansing, 5 Johns. 282 (1810)).

[23] Randall v. Brigham, 74 U.S. (7 Wall.) 523, 539-40 (1868). The plaintiff contended that judge Brigham never had jurisdiction to disbar him because there was never a formal accusation against him nor a formal citation issued to which he could answer. *Id.* at 539. The Supreme Court rejected this, holding instead that Randall received sufficient notice and opportunity to rebut the charges against him. *Id.*

[24] 80 U.S. (13 Wall.) 335 (1871).

case evolved from a suit brought by the attorney representing the accused murderer of President Lincoln against the presiding trial judge, George B. Fisher. After the jurors failed to reach a verdict in the criminal case, the judge discharged the jury and descended from the bench. At that juncture, the judge later recited that the defense attorney, Joseph H. Bradley, accosted the judge and threatened him with personal chastisement because of the judge's conduct from the bench toward Bradley.[25] As a result, Judge Fisher issued a written order purportedly striking Bradley's name from the roll of attorneys practicing in the Supreme Court of the District of Columbia. The judge later amended the order limiting the suspension to practice in the Criminal Court of the District of Columbia. Bradley then brought an action in the Supreme Court of the District of Columbia alleging that Judge Fisher's statements were false and fraudulent, and that the order removing him from the rolls of practitioners was entered maliciously and with corrupt motivation. In addition, the declaration alleged that Judge Fisher's order was made without notice to Bradley and that he had no opportunity to dispute the charges. The trial court held that the action would not lie as a matter of law.[26]

Speaking for the Supreme Court of the United States, Justice Field again cited English authorities, as well as Chief Justice Kent, and concluded that although Judge Fisher erred in striking Bradley's name from the roll of attorneys in an ex parte fashion, his act was nevertheless a judicial act for which he was not liable to answer in damages.[27] In reaching his conclusion, Justice Field enunciated the following rationale derived from the observation of Lord Coke:

> Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in [superior courts], in which there is great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which impose upon the judge the severest labor, and often create in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision

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[25] *See id.* at 337 (Judge Fisher sanctioned Bradley for threatening to chastise the judge in response to alleged insults directed towards Bradley).

[26] *Id.* at 340-41.

[27] *Id.* at 356-57. The Supreme Court held that the criminal court erred in not affording Bradley the opportunity to show cause why his name should not be struck from the list of practicing attorneys. *Id.* Nevertheless, Judge Fisher's act was a judicial one, making him immune from personal liability. *Id.* at 357.

> against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. . . . If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.[28] Justice Field further stated that if a judge could be compelled to answer in a civil action for his judicial acts, his office would be degraded and his usefulness destroyed.[29]

The *Bradley* Court then held that judges of a superior court of general jurisdiction have absolute immunity from civil liability for their judicial acts provided they had jurisdiction over the subject matter, although "irregularity and error attend the exercise of the jurisdiction."[30] Eventually, courts developed the rule that judges were immune from civil action for the exercise of judicial authority provided they did not act in the clear absence of jurisdiction. The example given for an act in clear absence of jurisdiction is when a probate court which has authority only over wills and settlement of estates proceeds to try parties for criminal offenses over which the jurisdiction of subject matter is entirely lacking.

II. THE EFFECT OF 42 U.S.C. SECTION 1983 UPON JUDICIAL IMMUNITY

Without question, the purpose of the Civil Rights Act of 1871 (Act), codified as 42 U.S.C. section 1983, was to provide an action in favor of persons deprived of civil rights guaranteed by the laws and Constitution of the United States by those acting under color of state law, custom, or usage.[31] The Act, however, is silent concerning

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[28] *Id.* at 348.

[29] *Id.* at 347.

[30] *Id.* at 354.

[31] 42 U.S.C. § 1983 (1982). The statute reads:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction to the deprivation

its effect upon common law immunities. In *Tenney v. Brandhove*,[32] the Supreme Court held that if Congress intended section 1983 to abolish legislative immunity it would have specifically said so.[33] It was not until 1967, in *Pierson v. Ray*,[34] that the Court specifically decided the effect of section 1983 on the doctrine of judicial immunity. In *Pierson*, a group of clergymen engaged in a "prayer pilgrimage" to promote racial integration, attempted to use a segregated waiting room in a Jackson, Mississippi bus terminal in 1961.[35] The clergymen were arrested and charged with breach of the peace in violation of a Mississippi statute which the Supreme Court of the United States subsequently found to be unconstitutional.[36] The clergymen waived a jury trial and were convicted by Judge Spencer, a judge of the Municipal Police Court. Later, after a trial de novo in the county court, one of the clergymen was acquitted by directed verdict. The prosecution then dismissed cases against the remaining clergymen.

Thereafter, the clergymen brought an action for damages against the police officers who arrested them and the judge of the Municipal Court who found them guilty in the United States District Court for the Southern District of Mississippi alleging false arrest and

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> of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

[32] 341 U.S. 367 (1951).

[33] Tenney v. Brandhove, 341 U.S. 367, 376 (1951). In *Tenney*, the plaintiff alleged that a California state legislative committee instituted an investigation and eventually brought charges against him in retaliation for certain activities and beliefs expressed by him. *Id.* at 371. The plaintiff sued the legislators for $10,000 pursuant to 42 U.S.C. section 1983. *Id.* On review, the Supreme Court held that Congress did not intend the Civil Rights Act of 1871 to overturn the long established doctrine of legislative immunity. *Id.* at 376.

[34] 386 U.S. 547 (1967).

[35] *Id.* at 552. The petitioners in this case, along with other black and white clergymen, undertook a "prayer pilgrimage" from New Orleans to Detroit to promote racial harmony. *Id.* at 552. Evidence at trial established that the petitioners planned to get arrested for using segregated facilities. *Id.* In Jackson, Mississippi, the petitioners entered a white only waiting area were they were arrested by local police. *Id.* at 552-53. Petitioners were charged with violating section 2087.5 of the Mississippi Code which made it a misdemeanor to congregate in a public place under circumstances constituting a breach of the peace. *Id.* at 549.

[36] *See* Thomas v. Mississippi, 380 U.S. 524 (1965) (per curiam) (reversing state conviction of freedom riders). In *Thomas*, the Court reversed the conviction of "freedom riders" who were arrested under circumstances similar to the *Pierson* case. *See* Thomas v. State, 252 Miss. 527, 535-36, 160 So. 2d 657, 670 (1964) (Mississippi Supreme Court holds statute not void for vagueness), *rev'd*, Thomas v. Mississippi, 380 U.S. 524 (1965). Without opinion, the *Thomas* court based its reversal on the notion that such arrests violate the Interstate Commerce Act, an approach used by the Supreme Court in Boynton v. Virginia, 364 U.S. 454 (1960). The *Boynton* Court held that racial discrimination by a restaurant in a railroad station or bus terminal violates section 216(d) of the Interstate Commerce Act. *Id.* at 459.

imprisonment, and violation of their civil rights.[37] At trial, the jury returned verdicts in favor of all defendants. The Court of Appeals for the Fifth Circuit found the municipal judge immune from liability under both section 1983 and the common law for acts committed within his jurisdiction.[38] In addition, the police officers who arrested the clergymen were held to have a qualified immunity. On appeal to the Supreme Court Chief Justice Warren, speaking for the majority, stated:

> We find no difficulty in agreeing with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions. The record is barren of any proof or specific allegation that Judge Spencer played any role in these arrests or convictions other than to adjudge petitioners guilty when their cases came before the court. Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine in *Bradley v. Fisher*. This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences." (*Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868), quoted in *Bradley v. Fisher* [at 349-50].) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making, but to intimidation.[39]

Chief Justice Warren further declared that section 1983 does not abolish this settled principle of law. Moreover, judicial immunity was equally well established as legislative immunity that was upheld in *Tenney v. Brandhove*.[40] Because Congress had ample opportunity to amend section 1983 and has failed to do so, it was presumed that Congress intended to uphold the validity of judicial and legislative immunity.[41]

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[37] Pierson v. Ray, 352 F.2d 213, 216-17 (5th Cir. 1965), *aff'd in part & rev'd in part*, 386 U.S. 547 (1967).

[38] *Id.* at 217.

[39] Pierson v. Ray, 386 U.S. 547, 553-54 (1967).

[40] *See* Tenney v. Brandhove, 341 U.S. 367, 376 (per curiam) (Congress did not intend Civil Rights Act of 1871 to abrogate legislative immunity).

It should be noted that although Mr. Justice Douglas upheld the general principle of judicial immunity, he was the sole dissenter in *Pierson v. Ray*.[42] He recognized that judges should be exempt from liability for the consequences of their honest mistakes, but would have adopted the doctrine that a judge should be liable "for the knowing and intentional deprivation of a person's civil rights."[43] Justice Douglas also stated that the doctrine of judicial immunity is based on a corollary of the doctrine of sovereign immunity, namely, that the King could do no wrong.[44] This statement is highly questionable in light of the fact that none of the opinions from *Floyd and Barker* through *Bradley v. Fisher* equated the doctrine of judicial immunity with the maxim "The King can do no wrong." Every decision following Lord Coke based the doctrine on the need for judicial independence rather than the doctrine of sovereign immunity. Indeed, as previously discussed, Coke spent much of his judicial career attempting to subject the King to the law, not suggesting that he should rise above it.[45] Nevertheless, even Justice Douglas would have preserved judicial immunity save for the most outrageous conduct in which a judge knowingly and deliberately violates a person's civil rights.[46]

The next challenge to judicial immunity occurred in the case of *Stump v. Sparkman*.[47] In *Stump*, the mother of a slightly retarded fifteen year old filed an ex parte petition with an Indiana circuit court judge asking the court to order her daughter to undergo a tubal ligation. The circuit court judge granted the petition. Two years after the operation, the young woman, who was now married, discovered for the first time that she had been sterilized during the court authorized procedure. Alleging a violation of her rights under section 1983, the woman brought action in federal district court against her mother, the physicians, the hospital where the ligation had been performed, and against Judge Stump.[48] The district court dismissed the complaint on the ground that Judge Stump was the only state actor and was immune from such an action because he acted in his judicial capacity. The Court of Appeals for the Seventh Circuit reversed on the ground that Judge Stump had not acted within his jurisdiction.[49] The circuit court held that the judge forfeited his immunity because he failed to comply with elementary principles of due process.[50]

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[41] Pierson v. Ray, 386 U.S. 547, 554-55 (1967).

[42] *Id.* at 566 (Douglas, J., dissenting). Justice Douglas believed judges who make honest mistakes should not be subject to civil liability for those reasons enumerated by the majority. *Id.* (Douglas, J., dissenting). He believed, however, that the language and legislative history of the Civil Rights Act of 1871 compelled the conclusion that Congress did not intend to exclude all judicial acts from liability. *Id.* at 561-63 (Douglas, J., dissenting). Only by subjecting the judiciary to liability could Congress guarantee the protections of the Act by ensuring judges would not impinge upon civil rights. *Id.* at 566-67 (Douglas, J., dissenting).

[43] *Id.* at 566 (Douglas, J., dissenting).

[44] *Id.* at 565 n.5 (Douglas, J., dissenting).

[45] *See supra* notes 4-6 and accompanying text (discussing conflicting views as to whether King subject to judiciary).

[46] Pierson v. Ray, 386 U.S. 547, 564 (1967) (Douglas, J., dissenting). Justice Douglas believed that preserving absolute judicial immunity would allow a judge to "vent his spleen" on particular parties or groups without fear of recourse. *Id.* (Douglas, J., dissenting). According to Justice Douglas, such a result would be monstrous and undermine the effectiveness of the Civil Rights Act of 1871. *Id.* (Douglas, J., dissenting).

[47] *See* Stump v. Sparkman, 435 U.S. 349, 364 (1978) (judges immune from liability for damages even if in error).

Speaking for the Supreme Court, Mr. Justice White reversed the circuit court's decision, holding that a trial judge of general jurisdiction in Indiana has the broadest grant of judicial authority.[51] Justice White distinguished the erroneous exercise of jurisdiction from the clear absence of jurisdiction.[52] In commenting upon judicial immunity, he observed:

> Despite the unfairness to litigants that sometimes results, the doctrine of judicial immunity is thought to be in the best interests of "the proper administration of justice . . . [,for it allows] a judicial officer, in exercising the authority vested in him [to] be free to act upon his own convictions, without apprehension of personal consequences to himself." [Citing] *Bradley v. Fisher*, 13 Wall., at 347. The fact that the issue before the judge is a controversial one is all the more reason that he should be able to act without fear of suit.[53]

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[48] Sparkman v. McFarlin, 552 F.2d 172, 173 (7th Cir. 1977), *rev'd*, Stump v. Sparkman, 435 U.S. 349 (1978).

[49] *Id.* at 176. Acknowledging the validity of judicial immunity, the court held that the doctrine does not protect a judge acting in clear absence of all jurisdiction. *Id.* at 174. Because Judge Stump lacked specific statutory or common law authority to sterilize the petitioner on ex parte application of the petitioner's mother, the court ruled that Judge Stump acted without jurisdiction and therefore was not protected by the doctrine of judicial immunity. *Id.* at 175-76.

[50] *Id.* at 176.

[51] Stump v. Sparkman, 435 U.S. 349, 359-60 (1978).

[52] *Id.* at 349. It may well be that the Court of Appeals for the Seventh Circuit, accustomed to looking for specific statutory authorization in order to empower federal judges to entertain an action, may have applied the same analysis erroneously to a state judge of general jurisdiction.

[53] *Id.* at 363-64.

Justices Marshall, Stewart, and Powell dissented, not on the ground of any disagreement with the general doctrine of judicial immunity, but asserted that Judge Stump's conduct did not amount to a judicial act because of his failure to observe the normal attributes of judicial process.[54]

The Court next addressed the issue of judicial immunity in *Supreme Court of Virginia v. Consumer's Union*,[55] in which a consumers' union that wished to publish a directory of lawyers, including their prevailing fees, sued the Supreme Court of Virginia for refusing to allow the advertisement of lawyer's fees. The Consumer's Union sought relief in federal court to enjoin the Supreme Court of Virginia from enforcing its ethical rule against lawyer advertising. The Supreme Court of the United States sidestepped the question of judicial immunity in reviewing the district court's injunction prohibiting the Supreme Court of Virginia from enforcing its ethical rule.[56] Justice White, again speaking for the majority, held that the promulgation and enforcement of rules governing attorneys' ethical conduct are legislative functions and, thus, judges are immune from declaratory or injunctive relief for legislative acts under *Tenney v. Brandhove*.[57] He did suggest, however, that the Virginia court would be subject to declaratory and injunctive relief, as well as the assessment of attorneys' fees in its enforcement capacity as opposed to its legislative or judicial capacity.[58]

III. THE RULE OF *PULLIAM V. ALLEN* AND ITS RAMIFICATIONS

The decision in *Pulliam v. Allen*[59] must be considered in the context of nearly four hundred years of unbroken adherence to the doctrine of judicial immunity with respect to superior court judges, and lower court judges of record provided they acted within their jurisdiction.[60]

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[54] *Id.* at 365 (Stewart, J., dissenting). The dissenters believed Judge Stump's act was not judicial because: "there was no 'case', there were no litigants, there was and could be no appeal, and there was not even the pretense of principled decision making." *Id.* at 368-69 (Stewart, J., dissenting). Because Judge Stump's decision lacked these attributes of a judicial proceeding, the dissenters felt his act was not judicial and hence he should not be afforded judicial immunity. *Id.* at 369 (Stewart, J., dissenting).

[55] 446 U.S. 719 (1980).

[56] *See id.* at 731 (issue is one of legislative immunity because act was legislative not judicial).

[57] *See* Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (Congress did not intend to abrogate legislative immunity); *see also supra* note 33 (discussing *Tenney* case).

[58] Supreme Court of Virginia v. Consumer's Union, 446 U.S. 719, 736-37 (1980).

[59] 104 S. Ct. 1970 (1984).

[60] It should be noted, contrary to the suggestion set forth in Feinman and Cohen, *Suing*

In *Pulliam*, Gladys Pulliam, a magistrate for the county of Culpeper in the Commonwealth of Virginia, set bail for Richmond Allen and Jessie Nicholson, the plaintiffs, for nonjailable offenses which they had committed. As a result, both Allen and Nicholson were incarcerated for failure to make bond, although they were charged with offenses which carried maximum penalties of $500 and $100 fines respectively.[61] After disposition of the original cases, Allen and Nicholson sued Magistrate Pulliam pursuant to section 1983. A federal district court judge found that Magistrate Pulliam regularly required bond for nonincarcerable offenses. The judge then held such practice to be unconstitutional on both due process and equal protection grounds and enjoined Magistrate Pulliam from further actions of a similar nature.[62] The court further directed that "any pretrial detention for persons arrested for Class 3 and Class 4 misdemeanors on the grounds that the person is lawfully deemed likely to be a danger to himself or to others may last only so long as such danger persists. . . ."[63]

In addition to injunctive relief, the district court awarded the sum of $7,691.09 to the plaintiffs as costs including a counsel fee of $7,038.00 pursuant to 42 U.S.C. section 1988. Magistrate Pulliam appealed only with respect to the award of a counsel fee against her. The Court of Appeals for the Fourth Circuit determined that the magistrate was not immune from either the award of counsel fees, nor from prospective injunctive relief.[64]

On certiorari, the Supreme Court addressed the issues of whether injunctive relief might be awarded against a judicial officer and, whether incident to such relief, an award of attorney's fees might be made. The Court answered both questions in the affirmative.[65]

Judges: History and Theory, 31 S.C.L. Rev. 201, 214-16 (1980) that only superior court judges were granted such immunity, that Lord Coke in *Floyd and Barker* specifically declared that such immunity would apply to justices of the peace as well as to the judge of assise. 77 Eng. Rep. 1305, 1306-07 (1607). A justice of the peace in England then, as now, is a judicial officer of limited jurisdiction, but is a member of a court of record. It is rare for a judge in the United States now not to be a member of a court of record which is defined as "a court that is required to keep a record of its proceedings and that may fine or imprison." Black's Law Dictionary 319 (5th ed. 1979).

[61] 104 S. Ct. at 1972.

[62] Allen v. Burke, 690 F.2d 376, 377-78 (4th Cir.), *aff'd*, Pulliam v. Allen, 104 S. Ct. 1970 (1982).

[63] 104 S. Ct. at 1973 n.2.

[64] Allen v. Burke, 690 F.2d 376, 379 (4th Cir.), *aff'd*, Pulliam v. Allen, 104 S. Ct. 1970 (1982).

[65] 104 S. Ct. at 1982. The court held that Congress clearly intended attorney's fees to be available under section 1988 for costs incurred in a section 1983 action. *Id.* Although the

Mr. Justice Blackmun, writing for the majority, conceded at the outset that at common law "there was no such thing as an injunction against a judge."[66] Injunctive relief was an equitable remedy which the Chancellor could only impose against the party or parties in proceedings before other courts.[67] Justice Blackmun pointed out, however, that this limitation did not stem from judicial immunity, but rather from the substantive confines of the Chancellor's authority.

Blackmun cited the practice of the Court of King's Bench issuance of writs of prohibition to prevent ecclesiastical courts from acting outside their jurisdiction.[68] Apparently, Justice Blackmun analogized the issuance of a writ of prohibition from the Court of King's Bench to ecclesiastical or inferior courts to the granting of injunctive relief by a federal court against a state judicial officer. He conceded that "[t]he relationship between the King's Bench and inferior courts is not precisely paralleled in our system by the relationship between the state and federal courts."[69]

Although this statement by Justice Blackmun is true, it is scarcely exhaustive or descriptive. Indeed, until the *Pulliam* opinion, the relationship between state and federal courts has never been described as one of a superior court toward an inferior one. The Court of King's Bench, as well as the ecclesiastical courts, were part of a unitary judicial system.[70] In substantially every state, courts of general jurisdiction, and almost invariably the highest court of each state, are authorized to issue writs of prohibition and other prerogative writs with respect to lower courts of the same jurisdiction.[71] Although Federal Rules of Appellate Procedure provide for the issuance of writs of mandamus or prohibition with respect to lower federal courts, they also provide that a respondent judge may elect not to appear in the proceeding without conceding the issues raised in the petition.[72] In effect, the writ operates against the party in interest as opposed to the judges of the federal district court.[73]

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doctrine of judicial immunity precluded an award of damages, section 1988 mandates an award of attorney's fees. *Id.*

[66] *Id.* at 1974.

[67] *Id.* (citing 2 J. STORY ON EQUITY JURISPRUDENCE ¶ 875, at 72 (11th ed. 1873)).

[68] 104 S. Ct. at 1976.

[69] *Id.* at 1978.

[70] *See* 3 W. BLACKSTONE, COMMENTARIES * 112.

[71] *See generally* 63A AM. JUR. 2D *Prohibition* § 75 (1984) (discussing constitutional and state provisions governing state court jurisdiction).

[72] FED. R. APP. P. 21(b).

[73] 104 S. Ct. at 1986 (Powell, J., dissenting).

Justice Powell vehemently disagreed with the majority and strongly asserted that:

> [T]he perceived analogy to the use of prerogative writs at English common law simply does not withstand analysis. . . . [T]he analogy rest on a peculiar practice at English common law that was occasioned by the unique relationship between the King's Bench and England's ecclesiastical courts. That relationship finds no parallel in this country. Moreover, our courts and the Federal Rules of Appellate Procedure have sought to limit the use of mandamus and prohibition for the very purpose of protecting judicial immunity. It is extraordinary, therefore, that the Court today should rely on the use of prerogative writs in England to justify exposing judicial officials in this country to harassing litigation and to subject them to personal liability for money judgments in the form of costs and attorney's fees.[74]

Justice Powell noted that both English common law cases and United States Supreme Court decisions identify the burden of harassing litigation, rather than potential pecuniary loss, as threatening judicial independence. In his dissent, Justice Powell quoted one of the justices in *Taaffe v. Downes* who illustrated the likely scenario resulting from suits for injunctive relief:

> 'If once you break down the barrier . . . and subject [judges] to an action, you let in upon the judicial authority a wide, wasting, and harassing persecution. . . . [Without the doctrine of judicial immunity, judges] become amenable to every other species of correction by a Court . . . [O]ne hour at the bar—the next at the bench, of the same or some other Court. They would have a busy and harassing time, getting from one station to the other—from Judge to the accused—from corrector to the corrected.'[75]

Acknowledging that suits for damages threaten judicial independence, Justice Powell vigorously pointed out that suits for injunctive relief pose even greater threats. Among other effects, he noted that the specter of contempt proceedings for alleged violations of injunctive orders is likely to inhibit unbiased judicial decision making.[76] Although Justice Powell conceded that Magistrate Pulliam had not appealed the district court's injunction, he maintained that the mischief inherent in such a remedy could nevertheless be well illustrated by the circumstances under which the court granted injunctive relief. It must be noted that the district court enjoined the magistrate from setting bail with a surety or cash bond except when the accused poses a danger to himself or others. Justice Powell stated that such a determination is normally left to the discretion of the arraigning judge.[77] This factual determination may be close and, in some instances, complex. After an injunction is issued, however, the arraigning magistrate would authorize pretrial detention at the peril of being held in contempt for making decisions which an enjoining federal judge might later determine to be incorrect.

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[74] *See id.* at 1987 (Powell, J., dissenting) (speaking for himself, Burger, C.J., Rehnquist, J., and O'Connor, J.).

[75] *Id.* at 1984, 1987 (quoting Taaffe v. Downes, 13 Eng. Rep. 15, 18, 20 (1813)).

[76] 104 S. Ct. at 1988 (Powell, J., dissenting).

Until the sage determination of the federal district judge for the Eastern District of Virginia, many state and federal judges may have understood that the principal purpose of bail is to secure the presence of the accused at trial. In the single case in which the Supreme Court reviewed the setting of bail by a federal district judge, *Stack v. Boyle*,[78] Chief Justice Vinson observed that the right to release before trial is conditioned upon the accused offering adequate assurance that he will stand trial and submit to a sentence if found guilty. Chief Justice Vinson further suggested that the modern practice of requiring a bail bond or sum of money subject to forfeiture serves as an additional assurance of the presence of the accused.[79] This general principle is preserved in the amended Bail Reform Act.[80] The Bail Reform Act specifically authorizes a federal judicial officer to impose conditions, including the execution of a bond with sureties or secured by cash as may be deemed reasonably necessary to assure the appearance of the accused. Whether by inadvertence or design, the federal district judge in *Pulliam* completely failed to take into account the central purpose of bail, namely, the securing of the presence of the accused.[81]

In 1972, in the case of *Argersinger v. Hamlin*,[82] the Supreme Court suggested that there are approximately forty to fifty million traffic misdemeanors in state courts annually. The Court also noted that there are approximately four to five million misdemeanors in state courts, excluding traffic violations.[83] Because these figures are based on pre-1970 statistical reports, it may be presumed that the numbers have increased rather than diminished.

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[77] *Id.* at 1988 n.15 (Powell, J., dissenting).

[78] 342 U.S. 1 (1951).

[79] *Id.* at 5.

[80] 18 U.S.C. § 3146(a) (1982).

[81] *See* 2 *Standards for Criminal Justice*, A.B.A. 10-5.1 and Commentary 10.64-68 (2d ed. 1980).

[82] 407 U.S. 25 (1972).

[83] *Id.* at 34 (citing Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 IOWA L. REV. 1249, 1261 (1970)).

State courts are confronted with a number of complex and difficult questions regarding limitations on their conduct in their judicial capacity. These issues include: what avenues are open to a state magistrate or traffic court judge who is confronted with a scofflaw who refuses to respond to a summons, or who, if placed on personal recognizance, does not appear?; may a warrant issue for the arrest of such a person and, if it does, what action should be open to the judge when the accused is again brought before the court?; if the judge happens to be Gladys Pulliam, can she set bail to assure that the accused will appear at the next setting of the trial date? Under the terms of the injunction issued against her by the federal district court, Magistrate Pulliam would be acting at her peril if she did so.

Of the forty to fifty million traffic misdemeanors noted in *Argersinger v. Hamlin*, it is reasonably safe to assume that many of these offenses are punishable only by fines. Furthermore, it is safe to assume that although misdemeanors such as speeding, crossing to the left of center, or failing to stop at a stop sign may be punishable by a jail term in many of these jurisdictions, such jail terms are seldom, if ever imposed. The question remains whether, pursuant to *Pulliam v. Allen*, federal courts will assume supervision of bail practices with respect to this formidable body of cases.

A mere contemplation of the problems confronting state and municipal judges indicates beyond a doubt that imposing the strait jacket of injunctive limitations destroys judges' usefulness to a greater extent than the possibility of a suit for damages. Indeed, I suggest that once a judge is enjoined by an order restricting his or her discretion in setting bail, the usefulness of that judge in the arraignment process is, for all practical purposes, eliminated. In *Stack v. Boyle*,[84] the Supreme Court suggested that a bond set at $50,000 for violation of the Smith Act, which prohibited membership in the communist party, was excessive.[85] The Supreme Court, however, with great deference to the trial judge, suggested to the petitioner that he move for reduction of bail in the federal district court.[86] This type of procedure is much more suitable than enjoining a judge from setting excessive bail in the future, as was done in the case of Gladys Pulliam.

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[84] 342 U.S. 1 (1951).

[85] *Id.* at 3.

[86] *Id.* at 7.

It should be noted that more than ninety percent of felonies, along with other types of litigation, are processed in state courts.[87] It is highly questionable whether federal courts would possess the competence or resources to supervise all the activities of state courts through civil actions culminating in injunctive relief. State courts were never intended as subordinate tribunals to federal courts. Their independence is essential to the proper administration of justice in this nation. Although federal courts enunciate the supreme law of the land within their sphere of jurisdiction,[88] the founding fathers always intended to preserve state sovereignty, and never suggested that states and their judicial officers be reduced to the status of mere provincial functionaries. James Madison pointed out in The *Federalist* papers that the genius of the new proposed federal government is that its powers would be limited to those specifically delegated while all other powers would be reserved to the states.[89] This concept was preserved in article X of the amendments to the Constitution which provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[90] The usurpation of state judicial power by blatantly subordinating state tribunals to federal courts effectively destroys this balance which was so laboriously conceived and constructed.

Lest it be felt that this article is overemphasizing the effect of injunctions upon judicial independence, let us now consider the effect of an award of counsel fees, which in some instances, provides a far greater deterrent than an award of damages. In *Pulliam*, the counsel fee awarded in the district court was $7,038 which together which costs totalled $7,691.09. This award was probably equivalent to or greater than the compensatory damage to which Allen and Nicholson would have been entitled for their incarceration. Allen was incarcerated for fourteen days, and Nicholson had been incarcerated four times for periods of two to six days. The award of the counsel fee by the federal district court, however, is only the tip of the iceberg. After running its course through the court of appeals and the Supreme Court, the ultimate fee and costs awarded to the successful counsel by agreement of the parties now is in the sum of $43,691.09. If it is thought that damages would deter a judge from independent and fearless decision-making, it must equally be conceded that the possibility of a $43,000 counsel fee accompanied by an injunction would deter even the most stouthearted judicial officer from deciding a case without fear of personal consequences.

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[87] Mr. Justice Douglas noted in *Argersinger v. Hamlin*, that in 1965, 314,000 defendants were charged with felonies in state courts as opposed to 24,000 in federal courts. 407 U.S. 25, 34 n.4 (1980) (citing President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, at 55 (1967)). Similar figures would be derived in the area of civil litigation as well.

[88] *See* U.S. Const. art. VI, § 2 (supremacy clause).

[89] *See generally* The Federalist No. 45, at 303 (J. Madison) (J. Cooke ed. 1961) (discussing limitation of powers of federal government).

[90] U.S. Const. art. X.

Clearly, the district court violated general principles of judicial immunity and independence by issuing an injunction and awarding damages. Furthermore, it is apparent that the court breached general equity principles in issuing this injunction. This unique and intimidating federal judicial relief was ordered without any showing that there was no adequate remedy at law by way of appeal or by petition for habeas corpus in the Virginia judicial system.[91]

It requires no great analysis of this singular and unprecedented decision to conclude that the doctrine of *Pulliam v. Allen* may well signal the twilight of judicial independence. Despite Justice Blackmun's pious exhortation that federal judges should exercise restraint and refrain from awarding equitable relief, and despite his reaffirmation of principles of comity and federalism, there is little guarantee that other federal judges will avoid the example of the federal judge of the Eastern District of Virginia in pursuing their knight errantry in search of constitutional violations.

Indeed, there is no better example than the injunction rendered against the Supreme Court of Virginia by a district court judge in *Supreme Court of Virginia v. Consumer's Union*.[92] Apparently believing a mere declaratory judgment to be insufficient, a federal district court judge in *Consumer's Union* enjoined the Supreme Court of Virginia from enforcing an ethical rule prohibiting attorneys from advertising their fees. It should also be noted that in *Consumer's Union*, the Supreme Court of Virginia merely committed the offense of passively failing to amend its ethical rules following the somewhat mixed signals given by the Supreme Court of the United States in *Bates v. State Bar of Arizona*.[93]

In the *Bates* case the Supreme Court of the United States, for the first time in the history of the Republic, determined that the highest court of a state, in the exercise of its supervisory power over members of the bar, was precluded by the first amendment from prohibiting advertising of fees for routine services by attorneys. In one fell swoop, the Court voided advertising ethics which had been adopted by almost every state pursuant to the American Bar Association Model Code. Vehemently dissenting from the *Bates* majority, Justice Powell suggested the difficulties which would arise from attempting to govern the advertising efforts of hundreds of thousands of lawyers. Strangely enough, in a later case, *In re R.M.J.*,[94] Justice Powell wrote a majority opinion for the Court in which regulation of advertising by attorneys was completely prohibited except for deceptive or inherently misleading advertising. Thus, the indications in *Bates* that state courts could still exercise supervision over advertising were largely swept away.

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[91] 104 S. Ct. at 1987 n.13 (Powell, J., dissenting).

[92] 446 U.S. 719 (1980).

[93] 433 U.S. 350 (1977); *see* Comment, Bates and O'Steen v. State Bar of Arizona: *From the Court to the Bar to the Consumer*, 9 Loy. U. Chi. L.J. 477, 500-03 (1978) (discussing problems with interpreting *Bates* decision).

An example of how the federal district court could have properly addressed the issues raised in *Consumer's Union* is found in a first circuit case. Following *Bates*, the Supreme Court of Rhode Island took steps to amend its disciplinary rules and adopted a provisional rule which regulated advertising by attorneys as the Rhode Island court perceived *Bates* to allow.[95] Litigation ensued in which the Supreme Court of Rhode Island instructed a law firm that its advertising violated the provisional rule.[96] This instruction resulted in an action brought against disciplinary counsel for the Rhode Island Supreme Court in federal district court.[97] The district court judge disagreed in part and agreed in part with the Rhode Island Supreme Court's limitation upon advertising. Because the district judge was sufficiently confident of the Rhode Island court's respect for the supremacy of federal law, he limited his judgment to a declaration of the partial invalidity of the Rhode Island rule.[98] Both parties appealed to the Court of Appeals for the First Circuit. Pending the appeal, the Supreme Court decided *In re R.M.J.*[99] This decision indicated that both the federal district judge and the Supreme Court of Rhode Island wrongly interpreted *Bates* and that henceforth only misleading advertising could be prohibited by a state court.[100] This mistaken interpretation of *Bates* resulted in an award of counsel fees against the Supreme Court of Rhode Island in the sum of $13,000.

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[94] 455 U.S. 191 (1982).

[95] *See* Provisional Order No. 11 of the Rhode Island Supreme Court Rules (adopted January 12, 1978) (disciplinary rules based on the American Bar Association's Model Code).

[96] Carter v. Lovett and Linder, Ltd., 425 A.2d 1244, 1245 (R.I. 1981).

[97] Lovett and Linder, Ltd. v. Carter, 523 F. Supp. 903 (D.R.I. 1981).

[98] *Id.* at 913.

[99] 455 U.S. 191 (1982).

Recently, in Supreme Court of *New Hampshire v. Piper*, the Supreme Court upheld a district court judge's determination that the New Hampshire Supreme Court's residency requirement was void.[101] Again, the federal judiciary limited itself to a declaratory judgment. Under the theory of *Pulliam*, however, the Court might well have issued an injunction against the Supreme Court of New Hampshire. In any event, counsel fees were assessed at $25,000.

Justice Douglas, that robust protector of civil rights who dissented from the grant of absolute judicial immunity, made the following observation in his dissenting opinion in *Pierson v. Ray*:

> This is not to say that a judge who makes an honest mistake should be subjected to civil liability. It is necessary to exempt judges from liability for the consequences of their honest mistakes. The judicial function involves an informed exercise of judgment. It is often necessary to choose between differing versions of fact, to reconcile opposing interests, and to decide closely contested issues. Decisions must often be made in the heat of trial. A vigorous and independent mind is needed to perform such delicate tasks. It would be unfair to require a judge to exercise his independent judgment and then to punish him for having exercised it in a manner which, in retrospect, was erroneous. Imposing liability for mistakes, though honest judicial acts, would curb the independent mind and spirit needed to perform judicial functions.[102]

No more eloquent argument can be made in favor of immunizing judges, including state supreme court justices of our several states, who attempt to perform the role of setting ethical and disciplinary rules for attorneys in the light of, at best, murky guidance from the Supreme Court of the United States relating to the protection afforded by the first amendment to commercial speech as well as the determination of compelling state interests in setting requirements for membership in the state bar. This is only one example of an area in which state judges may make "honest mistakes." State judges are often unaware that they have made mistakes until the Supreme

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[100] *Id.* at 203. *See generally* Weisberger, *The Bill of Rights and Benevolent Despotism: A Look at the Supreme Court's Role in Education, Regulation of Attorney Advertising and Obscenity*, 17 SUFFOLK U.L. REV. 23, 34-41 (1983) (discussing regulation of attorney advertising by the federal judiciary).

[101] 105 S. Ct. 1272, 1280-81 (1985).

[102] Pierson v. Ray, 386 U.S. 547, 566 (1967) (Douglas, J., dissenting).

Court issues a new opinion which destroys the constitutional base upon which state judges thought their ruling rested. A litany of citations is not needed to establish the proposition that the Supreme Court has recently made a number of changes in its constitutional adjudication, particularly in relation to the exclusionary rule.[103] For example, in *Illinois v. Gates*[104] and *United States v. Leon*[105] the Court recently cast even more doubt on the scope and applicability of the exclusionary rule.

The *Pulliam* doctrine coupled with the lack of collegiality in the Court, and the mixed signals which it has sent regarding the meaning and application of the Bill of Rights, make the exercise of the judicial function by state courts a perilous occupation. This problem will be particularly true if federal courts supervise state convictions and the application of procedural safeguards by injunction in addition to habeas corpus review pursuant to 28 U.S.C. section 2254.[106]

The need for judicial independence perceived by Coke and his successors is as forceful a policy consideration today as it ever was in the past. The current members of the Supreme Court who supported the *Pulliam* decision are no more gifted than their predecessors who decided *Bradley v. Fisher* and *Pierson v. Ray*. Just as Justice Taney's opinion in the *Dred Scott* case[107] may have precipitated the "War Between the States," it may some day be said that Justice Blackmun's opinion in *Pulliam v. Allen* signaled the twilight and decline of judicial independence.

IV. APPLICABILITY OF *PULLIAM V. ALLEN* TO FEDERAL JUDGES

Lest it be thought only state judges may be victims of harassing litigation pursuant to the *Pulliam* doctrine, it should be noted that *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[108] enunciated the doctrine of constitutional tort. Even though section 1983 is not applicable to federal officers, a remedy may be sought against such officers for violation of a right guaranteed by the federal constitution. *Butz v. Economu*[109] further recognized that it would be inappropriate to draw a distinction for immunity purposes between federal officers who are liable for constitutional torts and state officers who are subject to liability under section 1983.[110] Consequently, in *Butz*, the Court determined that the same immunities are afforded federal executives and quasi-judicial officers as their state government counterparts in section 1983 litigation.[111] An interpretation of *Butz* in the light of *Pulliam* leads to the conclusion that injunctive relief could be awarded against a federal magistrate or judge for violation of a person's constitutional rights. In addition to injunctive relief, the provisions of the Equal Access to Justice Act[112] may authorize the award of an attorney's fee against "any official of the United States acting in his or her official capacity. . . ." Therefore, the twilight of judicial independence signaled by *Pulliam* may darken the horizon not only of state but federal judges as well.

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[103] *See* Weisberger, *The Exclusionary Rule: Nine Authors in Search of a Principle*, 34 S.C.L. Rev. 253, 257 (1982) (discussing myriad of decisions of standards for exclusionary rule).

[104] *See* 462 U.S. 213, 238 (1983) (court abandons two tier probable cause test in favor of totality of circumstances test).

[105] *See* 104 S. Ct. 3405, 3416 (1984) (court creates good faith exception to exclusionary rule).

[106] *See* 28 U.S.C. § 2254(2) (1982) (discussing petitions for habeas corpus).

[107] 60 U.S. 393 (1856).

[108] *See* 403 U.S. 388, 395 (1971) (damages as remedy for violation of fourth amendment).

V. Conclusion

In adopting the Civil Rights Act of 1871, it is likely that a majority of Congress desired to secure the civil rights of the recently freed slaves in the confederate states. Although Justice Douglas quoted some of the congressional debate which indicated a recommendation that state judges might be affected[113] there is no suggestion that judges should be subjected to civil action for honest mistakes. The *Pulliam* doctrine exposes state and federal judges to a wide range of harassing and vexatious litigation. In addition, the doctrine may subject judges to injunctive orders accompanied by substantial costs and huge counsel fees.

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[109] 438 U.S. 478 (1978).

[110] *Id.* at 501. The *Butz* case involved an action brought against the Secretary of Agriculture. *Id.* at 481-82. Mr. Justice White, speaking for a majority of the Court, made two very pertinent observations:

> The Government argues that the cases involving state officials are distinguishable because they reflect the need to preserve the effectiveness of the right of action authorized by § 1983. But as we discuss more fully below, the cause of action recognized in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), would similarly be "drained of meaning" if federal officials were entitled to absolute immunity for their constitutional transgressions.

438 U.S. 478, 501 (1978). To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head. *Id.* at 504.

[111] 438 U.S. '478, 504 (1978).

[112] 28 U.S.C. § 2412 (1982).

[113] Pierson v. Ray, 386 U.S. 547, 561-64 (1967).

In enacting section 1983, Congress never intended to destroy or dilute judicial independence in the ordinary course of litigation. Perhaps no person in the history of the federal judiciary did more to implement the purposes and goals of the Civil Rights Act than Chief Justice Warren. Nevertheless, after careful analysis in *Pierson v. Ray*,[114] he concluded that Congress would have clearly provided for diminution or abrogation of judicial immunity in the Civil Rights Act had it so intended.[115]

Justice Frankfurter's opinions frequently warned against "throwing the baby out with the bath water." While Magistrate Pulliam's actions may have been erroneous, the radical action of injunctive relief against a judicial officer constitutes a cure far worse than the disease.

The specter of harassing litigation brought by disappointed parties against judicial officers is a chilling prospect, indeed. At a time when the courts of this country are overburdened with litigation, when citizens seek redress in the courts for a greater variety of perceived wrongs than ever before, it seems ill advised to add a new layer of distracting litigation upon the shock troops of the judicial system. Such flank attacks upon judicial officers can only result in increasing timidity and a tendency to avoid close and controversial decisions whenever possible. This type of litigation inevitably produces a syndrome of responses which ill befits an American judiciary which has provided the greatest safeguard of individual liberties ever known.

Although I feel Justice Blackmun's opinion in *Pulliam v. Allen* is based upon an erroneous application of history and a faulty analysis of the effects of injunctive relief upon judicial independence, I recognize this majority opinion is now the law of the land. Since the Court interpreted the intention of Congress as enunciated in sections 1983 and 1988, however, it is within Congress's province to clarify these statutes so that they provide specifically for judicial immunity from both injunctive relief and the award of counsel fees. No other course will guarantee the future of judicial independence in this country.

In a glorious example of respect for the judiciary, President Nixon accepted without question a decision of the Supreme Court of the United States ordering him to turn over evidentiary materials which could only result in his political ruin.[116] No greater example of the strength of "the least dangerous branch"[117] and the reverence in which it is held can be cited in the history of this or any other nation. This reverence and respect has been slowly created over a period of 200 years. Diminution of the stature of state and lower federal courts cannot fail to affect the prestige of the Supreme Court as well. It would appear at best imprudent and at worst sheer folly to weaken the foundations of our judicial system by acceptance or implementation of the *Pulliam* doctrine.

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[114] *Id.* at 547.

[115] *Id.* at 554-55.

[116] United States v. Nixon, 418 U.S. 683, 688 (1974).

[117] A. Bickel, The Least Dangerous Branch (1962).

Supreme Court of Rhode Island

Providence

JOSEPH R. WEISBERGER
ASSOCIATE JUSTICE

NOV 21

November 17, 1989

Senator Howell Heflin
The Subcommittee on Courts and Administrative Practice
Senate Judiciary Committee
223 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Heflin:

Pursuant to your letter of October 31, 1989, I enclose herewith my answers to questions propounded by Senators Thurmond, Grassley, and Kohl. In each instance, I have juxtaposed the question and the answer for ready reference.

I sincerely hope that these answers will be helpful to you and the members of the Subcommittee.

Thank you for this opportunity to expound further upon the testimony which I gave October 25, 1989.

With every good wish,

Sincerely yours,

Joe

Joseph R. Weisberger

JRW/spn

2220c

QUESTIONS SUBMITTED BY SENATOR THURMOND

QUESTION 1. Judge Weisberger, in past hearings on this subject, the American Civil Liberties Union has suggested that instead of passing legislation such as S. 590 to protect judicial officers, we pass legislation to simply encourage individual states to provide state court judges with indemnification protections. Do you believe such indemnification provisions are the proper solution to this problem? Why or why not?

ANSWER. In my opinion exposing judicial officers to suits for injunction is simply wrong whether or not attorney's fees are assessed against the judge as an incident thereto. I have set forth the reasons for this opinion in my former testimony and in the article which I appended to that testimony. However, in respect to the suggestion of the American Civil Liberties Union, I believe that it is utterly without merit.

In Monell v. Department of Social Services, 436 U.S. 658 (1978) the Supreme Court held for the first time that a municipal corporation was a "person" within the terms of 28 U.S. C. § 1983. In so holding the court overruled Monroe v. Pape, 365 U.S. 167 (1961). However, in Monell the Court went on to hold that a municipal corporation is responsible for acts of its officers or officials (in that case the Commissioner and Department of Social Services as well as the Board of Education and its Chancellor) only in the event that such officers have executed the official policy of the municipal corporation as evidenced by an ordinance, regulation, or decision officially adopted. The Court held that there is no such thing as respondeat superior liability under

§ 1983. The holding in this case would limit stringently the responsibility of a municipal corporation (including cities and counties) for counsel fees incurred by a judicial officer employed by such an entity.

In respect to judicial officers employed by a state, further difficulties would be encountered in imposing liability upon the sovereign entity. Although a municipality is a "person" for § 1983 purposes, a state is generally not considered to be a person Ray Will v. Michigan Dept. of State Police, 57 L.W. 4677 (June 19, 1989). In addition, a state may resist payment of counsel fees and costs on Eleventh Amendment grounds Kentucky v. Graham, 473 U.S. 159 (1985). Consequently, except for certain very restricted situations as set forth below, a state would not be responsible for counsel fee and costs imposed upon a judicial officer under 28 U.S.C. § 1983.

I have earlier set forth in my testimony that pursuant to Missouri v. Jenkins, 57 L.W. 4735 (June 19, 1989) the Eleventh Amendment would not be a bar to an award of attorney's fees ancillary to a grant of prospective relief against a state. However, for the state to be responsible for such an award the injunctive relief or declaratory judgment would of necessity be granted against the state itself or against a state officer who was acting in his or her official capacity in carrying out a state law, policy or custom. If the state judge were merely wrong in his or her interpretation of a federal constitutional right or, indeed, a statutory right, that judge could not demand with any hope of success indemnification by the state save on a voluntary basis.

I confess that I am utterly unable to conceive of any legislation which would be passed by the Congress which would "encourage" state legislators to provide judges with blanket indemnification whether the state would otherwise be liable or not. In my judgment state legislators would properly resist any such "encouragement", not only to protect their Eleventh Amendment rights but also state legislators would properly be reluctant to encourage actions to be brought against state judicial officers, by providing a "deep pocket" from which the expense of litigation might be paid.

Experience since the decision has been handed down in Pulliam v. Allen, 466 U.S. 522 (1984) has shown that hundreds of disappointed litigants have brought actions, the overwhelming majority of which have been without merit.

Unless the Congress is of the opinion (as the ACLU may be) that it is a positive good to harass and distract state judges by baseless litigation and to demean the state judiciary by hailing its members into court at the insistence of disappointed litigants, I would submit that this suggestion would be completely counterproductive and would in no way contribute to the independence or vitality of the state judiciary.

QUESTION 2. Judge Weisberger, absent a showing of an inadequate remedy at law within the state court judicial system or a serious risk of irreparable harm, do you believe there is a need for a federal court judge to enjoin a state court judge? If so, how so, and in what instances would it ever be appropriate?

ANSWER. Without question, I believe that any person who may be aggrieved by a decision of a state judicial officer should avail himself of the elaborate appellate mechanisms available within every state system. In the event that a judicial officer has acted not only erroneously but has failed to meet ethical standards, there also exists in every state a disciplinary mechanism with which complaints may be filed without costs. In my opinion, there has never been a demonstrated need to provide for the remedy of injunctive relief in the federal system in order to guarantee the respect for constitutional rights in a state judicial system. As you know, there is already federal oversight in respect to the decisions of the highest state courts through certiorari review by the United States Supreme Court. In respect to criminal convictions, 28 U.S.C. § 2254 provides for federal oversight at the district and court of appeals level of the constitutionality of state convictions. This latter statute requires exhaustion of state remedies. In my judgment, I can see no need for a federal judge to enjoin a state judge in respect to the performance of his or her judicial function. If we use the opinion in Pulliam v. Allen, as an illustration, an examination of that case, as Justice Powell pointed out in his dissent, reveals that the Commonwealth of Virginia had ample mechanisms for review of Magistrate Pulliam's decision on bail and that there was no need for an injunction.

The eloquent statement given by Chief Justice Warren in Pierson v.

Ray, 386 U.S. 547, 553-54 (1967) is as true today in respect to injunctive relief as it was in respect to an action for damages when uttered.

> "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall. 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' (Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1868), quoted in Bradley v. Fisher, supra, 349, note, at 350.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation."

2220c

QUESTIONS SUBMITTED BY SENATOR GRASSLEY

QUESTION 1. In their letter to Chairman Heflin dated October 24, 1989, the NAACP Legal Defense and Educational Fund (LDF) states as follows: "It was clearly contemplated by Congress when it enacted the Civil Rights Attorneys' Fees Act of 1976 that fees be awarded against the appropriate governmental entity, whether state, county, or local." The LDF cites a Senate Committee report (S. Rep. No. 94-1011 at p. 5) from the time of passage of Section 1988 as follows: "[I]t is intended that the attorneys fees, like other items of cost, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." The LDF goes on to note that at footnote 7 of the report, it is said that only where an official had acted in bad faith could he possibly be personally liable for fees. DO YOU AGREE OR DISAGREE WITH THIS ANALYSIS OF THE LEGISLATIVE INTENT OF THE FEES ACT? PLEASE EXPLAIN.

ANSWER. I believe that the LDF's analysis of legislative intent is irrelevant. The Supreme Court of the United States has determined in Monell v. Department of Social Services, 436 U.S. 658 (1978) that attorney's fees and other items of costs follow liability for damages. A governmental entity, even if a municipal corporation, is not responsible or liable for the actions of a state officer (whether judicial or otherwise) under § 1983 unless that state officer was carrying out a policy or custom of the governmental entity. There is no liability under respondeat superior for attorney's fees and costs. The Court also has held in Kentucky v. Graham, 473 U.S. 159 (1985) that a state may not be joined for the purpose of collecting counsel fees to an action against a state officer (in that case a police officer) because of the state's immunity from suit in a federal court under the Eleventh Amendment. These decisions are not based on the presence or absence of bad faith but on the question of whether the state officer has been carrying out a policy, custom or statute of the governmental entity. If a state officer is acting in such capacity as to be the alter ago of the state itself and if through that state officer injunctive relief is granted against the state itself, as in Missouri v. Jenkins, 57 L.W. 4735 (June 19, 1989) then under those narrow circumstances the state may be responsible for counsel fees.

However, a state judicial officer in construing a litigant's entitlement to a claimed constitutional right may well not be carrying out a policy, custom or statute of his or her employing entity, whether a municipal corporation or the state itself. In these days of rapid evolution of Supreme Court interpretation of constitutional rights (such as lawyer advertising, the right of the press to attend criminal trials and preliminary hearings etc.) it is not easy for a state judge or any other judge always to be correct in determining the nature and extent of perceived constitutional rights. If the state judge were merely wrong in his or her interpretation of a federal constitutional or even statutory right, he or she would have little hope of achieving indemnification of counsel fees or costs either from a municipal corporation or state government. I disagree completely that this determination would hinge on bad faith or the lack thereof.

QUESTION 2. The LDF letter criticizes S. 590 as follows: "The provision dealing with injunctive relief would unduly hamper federal judges in the exercise of their judgment against state officials in the expectation that they will obey the law. If, however, a federal judge, based on the facts of the case before it, believes an injunction is necessary, he or she should be free to issue one. When this provision is coupled with the ban on attorneys' fees, civil rights plaintiffs will be faced with having to go back to court with no possibility of compensation for the time required."

ANSWER. I could not disagree more strongly with the LDF's analysis. Its letter speaks as though injunctive relief by ~~state~~ federal judges against ~~federal~~ state judges had been a long-standing part of our federal-state relationship. Nothing could be further from the truth. Indeed, until 1984 and the somewhat startling opinion by Justice Blackmun in Pulliam v. Allen, it would have been the opinion of most scholars on this issue that there was no such thing as an injunction against a judge. Even Justice Blackmun admitted that at common law no such remedy was available. There might be injunctions against a party, but never against the judge. In my opinion any party who is aggrieved by a decision of a state judicial officer or tribunal has ample remedies in the appellate system which exists in every state. I suggest that there has never been a demonstrated need for the exercise of this newly discovered power on the part of the federal lower court judges to supervise and oversee the activities of state judicial officers who are responsible for more than 95% of all litigation in the United States.

The only result of the Pulliam decision has been to encourage hundreds of baseless actions brought by disappointed litigants against state judicial officers. These actions, though baseless, resulted in the harassment and distraction of state judicial officers from their primary function of deciding cases without fear or favor.

An early example of the issuance by a federal judge of an injunction against state judicial officers was found in Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980). In that case a federal district judge in Virginia saw fit to enjoin the Supreme Court of Virginia from enforcing its rule against lawyer advertising. The Supreme Court of Virginia, like almost every other state Supreme Court, had enacted ethical rules for the bar which included either a ban or limitation against attorney advertising. The Supreme Court of Virginia had not threatened anyone with this rule. The Supreme Court of the United States had shortly before in Bates v. State Bar of Arizona, 433 U.S. 350 (1977) determined that there was a First Amendment right on the part of lawyers to advertise fees for routine services. This somewhat ambiguous opinion took several years to be sorted out by state courts. In my judgment, it was unconscionable for this district judge to issue an injunction against the Supreme Court of Virginia in these circumstances. At most a declaratory judgment indicating the invalidity of the rule would have been appropriate. I have not yet seen a case in which the issuance of an injunction against a state judicial officer or state court was justified.

It may well be that the LDF is willing to thrust aside four centuries of accumulated wisdom in order to subject state judges to the harassment of being sued for injunctive relief in a federal court. I believe that such a position is unwise, unnecessary and unwarranted. It can only result in the erosion of the independence of the state judiciary.

2220c

QUESTIONS SUBMITTED BY SENATOR HERB KOHL

QUESTION 1. Please provide a realistic example of a situation in which a judge's activities would be "clearly in excess" of his or her jurisdiction, justifying that officer's payment of costs under S. 590.

ANSWER. In these days of simplified jurisdiction, it is not easy to conceive of a situation where a judge would act clearly in excess of his or her jurisdiction. The example used in Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871) was that of a probate judge who attempted to try a criminal case.

In a present-day context, it may well be that a probate judge could act in excess of his or her jurisdiction by attempting to pass upon equity matters which were not placed within his or her jurisdiction, by the appropriate statute defining the jurisdiction of the court.

Also, in many jurisdictions, courts of limited powers and particularly justices of the peace may have distinct limits upon their jurisdiction. An attempt to go outside that jurisdiction might well be clearly in excess of the judge's powers. For example if a justice of the peace purported to impose a penalty upon a defendant greater than that permitted by his or her statutory powers, this might well be an act clearly in excess of jurisdiction.

The point of this exception in the statute is that a judge who acts clearly in excess of his or her jurisdiction is not performing a judicial act at all and, therefore, would not be entitled to the defense of judicial immunity.

QUESTION 2. Last year, at a hearing on the predecessors to S. 590, Morton Halperin of the ACLU made two points that may deserve consideration. First, he contended that the fairest solution is for states to pass statutes agreeing to be sued for costs in cases brought against state judges. "That would mean," Halperin said, "that you would sue the judge if necessary for declaratory or injunctive relief, but you then sue the State for the attorneys' fees." Second, Halperin stated: "The normal comity between judicial officers and the respect for federalism which the Supreme Court has recently emphasized will, we believe, lead federal judges to bend over backwards to avoid issuing injunctions against state judges except in the most egregious situations. In such cases, where a state judge is continually violating the constitutional rights of persons under his or her jurisdiction, the federal court should be free to enjoin the action.

How would you respond to Halperin's and the ACLU's concerns?

ANSWER 2.A. I believe that the suggestion of Mr. Halperin is clearly without merit. Few state legislators could be expected to pass legislation allowing his or her state to be responsible for attorney's fees and costs in actions brought against a judicial officer. In the first place states are protected from suit for counsel fees except in very narrow instances by the Eleventh Amendment. Kentucky v. Graham, 473 U.S. 159 (1985). A state legislature could not be expected to waive this defense in order to encourage suits against members of its state judiciary. Such a position borders upon the ludicrous.

In the narrow situation in which a state may be responsible for an award of an attorney's fee as in Missouri v. Jenkins, 57 L.W. 4735 (June 19, 1989) the injunctive relief or declaratory judgment would of necessity be granted against the state itself or against a state officer who is acting in his or her official capacity in carrying out a state law, policy or custom. If the state judge were merely wrong in his or her interpretation of a federal constitutional right or a statutory right, that judge could not demand or even expect indemnification from the state save on a purely voluntary basis. I would not expect states voluntarily to undertake this kind of liability. Most of the actions which have been brought against state judges since Pulliam v. Allen have been baseless and, therefore, no attorney's fee has been assessed. It would be counterproductive for states to encourage such baseless suits by holding out the possibility of counsel fees to be furnished by the state in the event that success was achieved. No state would wish to be a party to degrading and demeaning its state judiciary by encouraging that suits be brought against its members as a matter of course by disappointed litigants. This has been the point of judicial immunity for 400 years. I would not expect state governments to abandon the idea of judicial immunity by encouraging suits for injunctive relief.

2B. It is true that the doctrine of comity might well persuade some federal judicial officers that injunctive orders against state judges should be sparingly applied. However, we need only look to the case of Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) to find an example of a federal district judge who issued an injunction against the Supreme Court of Virginia entirely unnecessarily. The question there was whether Virginia's rule against lawyer advertising was consonant with the then recent case of Bates v. State Bar of Arizona, 433 U.S. 350 (1977). A declaratory judgment would certainly have been adequate to the purpose but the federal district judge was not content with that and issued an injunction, even

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though the Supreme Court of Virginia had not threatened enforcement and had simply failed to amend its rule (a legislative determination) in light of Bates. Recently, in Johnson Newspaper Corporation v. Glen R. Morton, 862 F. 2d 25 (2nd Cir. 1988) a federal district judge issued a declaratory judgment and would have assessed counsel fees against a New York State Judge for closing a suppression hearing to the press on the application of both prosecution and defense. The Second Circuit ultimately found that the issuance of a declaratory judgment was inappropriate under the circumstances since the state judge had made a transcript available to the press as soon as the defendant had pleaded to the offense and nearly two years before the federal district judge issued his decision.

As I have previously stated, the elaborate appellate mechanisms available in every state as well as discipline procedures available in every state make the intervention of the federal judiciary by way of injunctive relief unnecessary.

I suppose that in the Morton case the state judge might then have brought an action in another federal district court against the United States District judge who had wrongfully issued a declaratory judgment against him for violation of a perceived constitutional right to decide cases without improper interference. Such an action might lie under the Bivens Doctrine. However this short circuiting of the appellate process by bringing suit against a judge with whom one disagrees only tends to subvert and degrade the judicial process. Judge Morton was vindicated by the Second Circuit. It was wholly unnecessary (nor did he attempt) to achieve relief by suing the judge.

Mr. Halperin apparently believes that federal judges may be trusted to withhold injunctive relief save where egregiously necessary. To some extent this may be true, but it will not insulate trial judges against the harassment of responding to litigation filed in the federal courts. This was the great reason for the formulation of the doctrine of judicial immunity in the first place. If one reads the opinion in Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871) and in Pierson v. Ray, 386 U.S. 547 (1967), the rationale in both cases is the same. Judicial immunity is essential to the preservation of judicial independence, not to protect the corrupt judge, but to protect the process against harassment and degradation by allowing judicial officers to be sued at the instance of disappointed litigants. Certainly Chief Justice Warren was as sensitive to civil rights as is Mr. Halperin, but he saw the evil inherent in the elimination of judicial immunity in circumstances even where a civil right had been violated.

Senator HEFLIN. Thank you.

We will now hear from Judge Thomas C. Nurre.

STATEMENT OF HON. THOMAS C. NURRE, JUDGE, COURT OF COMMON PLEAS, CINCINNATI, OH, AND PRESIDENT, AMERICAN JUDGES ASSOCIATION

Judge NURRE. Thank you, Senator Heflin and Senator Thurmond.

I would reiterate and support the comments of the previous speakers. I wanted to thank you for giving the American Judges Association the opportunity to express its opinion on this proposed legislation. I am delighted that I was designated to present the views of AJA, its executive committee, its boards of governors and its membership.

The American Judges Association is celebrating its 30th anniversary and is the independent organization for all local, State, Federal judiciary representing judges and judicial officers from the 50 States, the District of Columbia, United States territories, and Canada. The National Center for State Courts serves as our secretariat.

The objectives and purposes of the American Judges Association are to promote, advance and improve the prompt and effective administration of justice and to promote and maintain the professional status and independence of the judiciary We are committed to making known our position on important issues affecting the judiciary and the administration of justice, and to take action when appropriate.

It is with these objectives and purposes in mind that I come before you today to inform you that AJA strongly supports S. 590, to reverse the impact of *Pulliam* v. *Allen*, which case held that traditional judicial immunity is not a ban to prospective injunctive relief, nor a ban to an awards of attorney fees in a civil rights action against a judicial officers acting in such officer's official capacity.

The loss of judicial immunity, in any degree, does great harm to the administration of justice under the American judicial system. A free and independent citizenry cannot exist in the absence of a free and independent judiciary. The fear of law suits or the perception by the public of a judge being in fear of being sued, may very well adversely influence judicial determinations and prevent judges from rendering fair decisions.

Judicial immunity, like any other fundamental legal doctrine, would lose its protections, if litigants were allowed to chip away at it. If injunctive relief and the awarding of attorney fees are allowed today, then what will be following tomorrow? Will special damages or general damages be allowed in future cases? Where will it all end? A strong stand must be taken today to guarantee a free and independent judiciary.

In 1985 and again in 1986, AJA adopted resolutions in support of the minority opinion in *Pulliam* and urged Congress to pass legislation that would provide that no judicial officer should be held personally liable in nay proceeding brought against the judicial officer for actions taken in an official capacity. AJA is convinced that the majority holding in *Pulliam* undermines the fundamental doctrine of judicial immunity and endangers the guarantee of a free and independent judiciary.

On February 26, 1988, the Honorable Ira J. Raab, chair of the AJA's legislative committee, appeared before you on behalf of our association. We urged your subcommittee to work with national judicial organizations to redraft S. 1512, S. 1515, and S. 1482, so as to resolve the problems that the various judicial organizations raised at that last hearing. S. 590 does just that.

If *Pulliam* is not overturned, a State judge may be reluctant to render a decision in a close case for fear of being sued for attorney fees that may exceed the judge's entire annual salary. The attorney fees sought in *Pulliam* exceeded $80,000.

The ACLU suggests that, instead of passing legislation to override *Pulliam*, that you should pass legislation to encourage States to provide State judges with defense and indemnification in such actions. It is difficult enough to get State legislatures to appropriate funds for the improvement of courthouse facilities and fair judicial salaries. It will be next to impossible to get State legislatures to appropriate funds for indemnification.

Accordingly, the American Judges Association joins with the Conference of Chief Justices, the ABA Judicial Administration Division, and other judicial organizations in full support of S. 590.

A personal comment: I have been on the bench for about 21 years and active in the American Judges Association almost that long, and it is my experience that the judges have expressed more concern about this issue than most any other issue I can think of, perhaps with the one exception of their own salaries.

Thank you for hearing us.

[The prepared statement of Judge Nurre and answers to questions submitted by Senators Thurmond, Grassley, and Kohl follow:]

American Judges Association

Serving the justice system since 1959

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October 25, 1989

STATEMENT OF THE AMERICAN JUDGES ASSOCIATION TO THE U.S. SENATE JUDICIARY COMMITTEE'S SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICES IN SUPPORT OF S. 590 TO REVERSE THE EFFECTS OF PULLIAM V. ALLEN.

Mr. Chairman, thank you for giving the American Judges Association the opportunity to express its opinion on the proposed legislation. I am delighted that I was designated to present the views of AJA, its Executive Committee, its Board of Governors and its membership.

The American Judges Association is celebrating its 30th anniversary and is the independent organization for all local, state and federal judiciary representing judges and judicial officers from the 50 states, District of Columbia, U.S. territories and Canada. The National Center for State Courts serves as our Secretariat.

The objectives and purposes of the American Judges Association are to promote, advance and improve the prompt and effective administration of justice and to promote and maintain the professional status and independence of the judiciary. We are committed to making known our position on important issues affecting the judiciary and the administration of justice, and to take action when appropriate.

It is with these objectives and purposes in mind that I come before you today to inform you that AJA strongly supports S. 590, to reverse the impact of Pulliam v. Allen, 104 S. Ct. 1970 (1984), which case held that traditional judicial immunity is not a ban to prospective injunctive relief, nor a ban to an award of attorney fees in a civil rights action against a judicial officer acting in such officer's official capacity.

The loss of judicial immunity, in any degree, does great harm to the administration of justice under the American judicial system. A free and independent citizenry cannot exist in the absence of a free and independent judiciary. The fear of law suits, or the perception by the public of a judge being in fear of being sued, may very

The independent organization for all local, state, and federal judiciary
of judges—by judges—for judges

well adversely influence judicial determinations and prevent judges from rendering fair decisions.

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In 1985 and again in 1986, AJA adopted resolutions in support of the minority opinion in Pulliam v. Allen and urged Congress to pass legislation that would provide that no judicial officer should be held personally liable in any proceeding brought against the judicial officer for actions taken in an official capacity. AJA is convinced that the majority holding in Pulliam undermines the fundamental doctrine of judicial immunity and endangers the guaranty of a free and independent judiciary.

On February 26, 1988, the Honorable Ira J. Raab, Chair of AJA's Legislative Committee, appeared before you on behalf of our Association. We urged your subcommittee to work with national judicial organizations to redraft S. 1512, S. 1515 and S. 1482 so as to resolve the problems that the various judicial organizations raised at that last hearing. S. 590 does just that!

If Pulliam is not overturned, a state judge may be reluctant to render a decision in a close case for fear of being sued for attorney fees that may exceed the judge's entire annual salary. The attorney fees sought in Pulliam exceeded $80,000.00.

The A.C.L.U. suggests that instead of passing legislation to override Pulliam, that you should pass legislation to encourage states to provide state judges with defense and indemnification in such actions. It is difficult enough to get state legislatures to appropriate funds for the improvement of courthouse facilities and fair judicial salaries. It will be next to impossible to get state legislatures to appropriate funds for indemnification.

Accordingly, the American Judges Association joins with the Conference of Chief Justices, the ABA Judicial Administration Division and other judicial organizations in full support of S. 590.

Again, thank you for giving me the opportunity to express the views of the American Judges Association.

American Judges Association

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November 23, 1989

Reply to:

Hon. Ira J. Raab
Chair, Legislative
Committee
375 Westwood Rd.
Woodmere, NY 11598
(516) 374-6500.

Senator Howell Heflin
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Senator Heflin:

At the request of Judge Thomas C. Nurre, the president of the American Judges Assn., I am writing to you in response to your October 31, 1989 letter addressed to Judge Nurre.

Judge Nurre shared your letter with members of the Executive Committee of AJA and asked that their responses be sent to me.

Enclosed please find a summary of the responses that I received. We hope that our answers to the various questions of the senators will help the passage of S. 590.

Please feel free to contact Judge Nurre if there is anything else that the American Judges Assn. can do for you. We greatly appreciate your strong support for such legislation. Good luck!

IJR:rs Encl.

Sincerely,

IRA J. RAAB
Chair,
Legislative Committee

c.c.:

Judge Thomas J. Nurre, President
Court of Common Pleas
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American Judges Assn.

QUESTIONS BY SENATOR THURMOND

1) As a state court judge, what impact, if any, has the Pulliam decision had on your day to day decision making in the courtroom? Is the impact shared by your peers? Why or why not?

The majority of the respondents felt that the Pulliam decision has made a significant impact on a judge's decision making. Where a judge hears cases of slight or no significance, the impact is of lesser or no effect. However, where a judge hears cases of more significant or major social issues, the impact is greater. The fear of personal liability in a civil rights action may rest on a judge's mind and cause the judge to hesitate or compromise in making what would otherwise have been an "honest" decision. This places a chilling effect upon the judicial process.

The majority of the respondents felt that the impact is indeed shared by their peers. At one extreme, the shared frustration and fear is considered to be "one of the most serious problems facing the bench in some time." At the other extreme, the Pulliam decision has had "very little impact, as few judges really understand the ruling."

One judge stated that his colleague was unwilling to report a lawyer's ethical violation to the bar association for fear of a subsequent civil rights action should the lawyer prevail.

2) Assuming S.590 is enacted into law, could this legislation in any way be interpreted to limit anyone's right to a judicial hearing for complaints alleging unconstitutional actions by state court judges?

The respondents unanimously agreed that the enactment into law of S.590 would in no way limit the right to a judicial hearing for complaints alleging unconstitutional actions by state court judges. Every state has some type of impartial forum for hearing complaints against judges for violations of their judicial duties. Possible sanctions range from reprimand to removal. In addition, every state has an appellate procedure to review judges' alleged constitutional errors. These systems have given adequate protection long before the Pulliam decision.

American Judges Assn.

QUESTIONS BY SENATOR GRASSLEY

1) Do you agree or disagree with the analysis of the NAACP Legal Defense and Educational Fund (LDF) as to the legislative intent of the Civil Rights Attorneys' Fees Act of 1976? Please explain.

The respondents unanimously disagreed with the LDF analysis. The Pulliam decision concerned an "incorrect" decision, and not a "bad faith" decision. This is what judges fear the most. To hold a judge personally liable for attorneys' fees for making an incorrect decision undermines the very purpose of an independent decision making process. It will open the flood gates to litigation against state court judges. More than 2,000 cases have already been filed against state court judges, many of a vexatious nature. Many states and local governments will not indemnify judges for judgments rendered in such suits. It is difficult enough to get state legislatures to appropriate sufficient funds for greatly needed court staff and facilities and for fair and adequate judicial salaries. It will be more difficult to get them to appropriate funds to indemnify judges.

2) Do you agree or disagree with the analysis of LDF as to why injunctive relief should be available against state court judges? Please explain.

The respondents unanimously disagreed with the LDF analysis. The judicial system, with the available appellate procedures, has functioned adequately before the Pulliam decision, without any intervention. To put additional responsibility, in time and expense, on the state judicial system, is unreasonable and contrary to the best interests of the public.

QUESTIONS BY SENATOR KOHL

1) Please provide a realistic example of a situation in which a judge's activities would be "clearly in excess" of his or her jurisdiction, justifying that officer's payment of costs under S.590.

There should be no situation in which a judge's activity would justify the payment of costs under S.590. Any activity that is in excess of a judge's jurisdiction should be the subject of an appropriate state judicial disciplinary authority. One judge opined that justification would arise if,in bad faith, a judge acted where there was no jurisdiction to begin with, such as where the crime was committed in another state.

AMERICAN Judges Assn.

2) How do you respond to the concerns of Morton Halperin and the ACLU, as expressed last year, at the hearing on the predecessors to S.590?

It is unrealistic and impractical to expect the states to agree to be sued for costs in cases brought against judges. State legislatures do not presently appropriate sufficient funds to pay for adequate court facilities, staff and administration. The criminal justice system is bulging at the seams, with over-crowded dockets and jails. There would be a great loss of time and money if sitting judges had to defend such suits.

Where a state judge continually violates the constitutional rights of persons under the jurisdiction of the judge, there are safeguards through the appellate process and the state judicial disciplinary procedures to adequately protect such persons. There is no need for the intervention of the federal courts.

Senator HEFLIN. Congressman Butler, we are delighted to see you.

STATEMENT OF M. CALDWELL BUTLER, ATTORNEY, WOODS, ROGERS & HAZLEGROVE, ROANOKE, VA

Mr. BUTLER. Thank you, Senator. I appreciate the chance to be here.

Several years ago, Chief Justice Carrico appointed a committee of judges, an ad hoc committee of judges and lawyers to follow the congressional response to *Pulliam*, and my membership on that committee is why I am here today. I am also accompanied by several members of that committee, including Judge John Winston and Judge Henry Kusogy from Tidewater, VA, and we simply want to reiterate what has been said here today.

Your Honor, I have a formal statement, Senator, which I would ask you to consider as part of the record, but I would like to make the observation, from the point of view as a member of the bar, that we have a real interest in this legislation as well. I am not unmindful of the fact that the two members of the committee who are here today are former judges, but this is a matter that also concerns those people who have to practice before the judges and you have to take into consideration that, as lawyers are making more money and the spread between what lawyers make and what judges make is becoming progressively wider and that opportunities to be on the bench are being weighed very carefully by the talented young men we would like to make judges.

Now, when you throw on the scale the possibility that, even though you are on the bench, that you are going to be the subject of the harassment that has been outlined here today, it makes perfectly clear that the difficulty we are going to have of getting judges today is going to be even greater if this *Pulliam* opinion is allowed to stand without correction by the Congress.

What has been said about the independence of the judges, of course, is very much on everybody's mind today and it is outlined in our statement. I agree exactly with the opening remarks of Senator Heflin and we are hopeful that this legislation can move quickly so that it will have an opportunity to become law this year, during this Congress. It is important, from the point of view of those of us who are interested in the future of the judges in this country.

I appreciate the opportunity to be here today.

[The prepared statement of Mr. Butler and answers to questions submitted by Senators Thurmond, Grassley, and Kohl follow:]

STATEMENT OF

M. CALDWELL BUTLER

of the

VIRGINIA COMMITTEE AGAINST PULLIAM

before the

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICES

of the

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

on the subject of

JUDICIAL IMMUNITY -- S. 590

OCTOBER 25, 1989
WASHINGTON, DC

Mr. Chairman and Members of the Committee:

My name is Caldwell Butler. I am a lawyer with Woods, Rogers & Hazlegrove in Roanoke, Virginia, and a former Congressman from Virginia. I am here today as a representative of the Virginia Committee Against Pulliam.

I appreciate the opportunity to appear today before you in order to express the Virginia Committee Against Pulliam's enthusiastic support for S. 590. In Pulliam v. Allen, 466 U.S. 522, 543 (1984), Justice Blackmun recognized the logic inherent in the argument that "attorneys' fees are the functional equivalent of monetary damages[,]" and "the chilling effect of a damages award is no less chilling when the award is denominated attorney's fees." Nonetheless, he, speaking for the majority, stated that "it is for Congress, not this Court, to determine whether and to what extent to abrogate the judiciary's common-law immunity." This congressional sub-committee now has the opportunity to accept Justice Blackmun's challenge and by supporting S. 590, can enable Congress to reaffirm judicial immunity, the bulwark of independent judicial decision making.

As you know, Pulliam originated in my State of Virginia. In response to this decision, the Virginia General Assembly adopted a resolution expressing support for the congressional enactment of legislation amending 42 U.S.C. § 1998 to prohibit the award of attorney's fees against judges arising out of actions for injunctive relief. Additionally, the Virginia Committee Against Pulliam enthusiastically and without qualification supports the adoption of S. 590 by the United States Congress.

Pulliam's ramifications upon the independence of judicial officers are not limited to Virginia, but instead are national in scope. As a result, the effects of Pulliam require congressional redress. The doctrine of judicial immunity was a cornerstone of the common law; therefore, Pulliam cannot be allowed to eviscerate the doctrine and the assurance of neutral and detached judicial officers inherent therein. Judicial effectiveness will be curtailed if judges are forced to adopt a defensive posture or weigh personal interest and self-protection against the public interest when rendering decisions. As everyone knows, no person, whether judicial officer, lawyer or Congressman, will be as effective if the individual must look continuously over his shoulder in anticipation of unmerited financial and personal retaliatory attacks. The quality and effectiveness of our court system is at stake, and it will deteriorate unless Congress recognizes the problems created by Pulliam and adopts S. 590 in order to ameliorate these difficulties.

The majority in Pulliam ignored reality. By simultaneously permitting suits for attorney's fees and costs against judicial officers acting in their judicial capacity and acknowledging that actions for damages against judicial officers are prohibited, the court made a distinction without a difference. Rising legal costs and continuous appeals result in the accumulation of massive attorney's fees and costs, and the burden of defending a suit for attorney's fees and costs does not differ in terms of character, preparation, and expenditure of resources from defending an action for damages. Furthermore, the issuance of an injunction against a state court judge and the potential for contempt proceedings for violation of the injunctive order inhibits unbiased judicial decision making as effectively as an action for damages. The threat of vexatious litigation, whether the remedy sought is damages, attorney's fees and costs or injunctive relief, will undoubtedly constrict judicial discretion and will likely influence judicial decisions, especially in close cases where the judge's ruling will be unpopular or controversial. A mechanism which allows judges to be intimidated or coerced into rendering "safe" decisions weakens the vitality and sanctity of our judicial system.

The harmful effects of vexatious litigation and the potential for judicial intimidation inherent therein are obvious. Therefore, the strength of our judicial system will decline unless S. 590 is adopted in order to address the problems for judicial economy and administration and judicial decision making created by Pulliam. These problems will intensify if not immediately redressed because the lure of large attorney fees and costs now routinely awarded to prevailing 42 U.S.C. § 1983 plaintiffs will encourage lawyers to recommend and press meritless suits against judicial officers. Moreover, the ability to recoup attorney's fees and costs under 42 U.S.C. § 1988 will stimulate disappointed and unsuccessful plaintiffs to file more suits against unsuspecting judicial officers acting within the parameters of their judicial capacity.

The cost of these awards will be borne by the individual states. Although most states are not legally obligated to indemnify the judge for the attorney's fees and costs assessed against her, most states will, as my state of Virginia did in Pulliam, end up absorbing the financial burdens of these awards. Undeniably, these fees and costs will be charged against the budget of the judiciary of the state and will therefore result in a reduction in the judicial's services available to the citizens of that particular state. The Virginia Committee Against Pulliam believes S. 590 should be adopted to prevent this result.

The legal system in this country cannot function efficiently and effectively, and judicial officers cannot provide objective justice if their well-reasoned and conscientious decisions are rendered amidst an atmosphere encouraging costly and time consuming retaliatory litigation. Judicial immunity assures the effectiveness of an independent and detached judicial body. Pulliam has challenged the sanctity of this principle; therefore, Congress should adopt S. 590 before Pulliam's effect on judicial decision making and judicial budgets becomes permanent and expansive. As a former Congressman from Virginia and a present member of the Virginia Committee Against Pulliam, I urge this sub-committee to work in earnest for Congress' adoption of S. 590.

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November 30, 1989

Honorable Howell Heflin
United States Senate
Committee on the Judiciary
223 Hart Senate Office Building
Washington, D.C. 20510-6275
ATTN: Matt Pappas

Re: S 590

Dear Senator Heflin:

Enclosed please find responses to questions forwarded with your letter of October 31, 1989, concerning hearing on the above.

Thank you for the opportunity to testify.

With kindest regards, I am

Very truly yours,

M Caldwell Butler

M. Caldwell Butler

MCB/ak

Enclosures

QUESTIONS SUBMITTED BY SENATOR THURMOND

MR. CALDWELL BUTLER - ATTORNEY

WOODS, ROGERS AND HAZLEGROVE

1. Mr. Butler, as a practicing attorney, do you believe there is a monetary incentive for attorneys to file federal actions against state court judges, and if so, could you explain how this incentive works?

> A. Attorneys do have a monetary incentive to sue state court judges on constitutional grounds in federal courts. In state court civil actions, winning for the attorney usually means getting a pre-agreed upon per cent of the recovery, if any. By proceeding directly in federal court and winning, even in part, these same attorneys will be entitled to be awarded a fee for each hour put into the case at a rate customary in the area, and all of their expenses. The only federal court limit upon any such amounts to be awarded is that of reasonableness, to be determined by the judge.

2. As a practicing attorney, what impact if any do you believe the Pulliam decision has had on the day to day decision making of state court judges in the courtroom?

> A. State court judges for the most part seek to deal justly with those citizens who come before them as parties and as witnesses. They have always known that whatever they decide can be reviewed and set aside on appeal. They take pride in correctly interpreting and applying the law in each case.

The introduction through Pulliam of a personal sanction available for use against them by a federal judge of equal standing who disagrees with their rulings has shaken the confidence of state judges and caused resentments against those who may so rule. Of course, those same state court judges have already reviewed existing procedures and revised any that could conceivably bring the Pulliam sanctions into play. No state court judge with sound mind will recklessly invite federal intervention.

Pulliam itself involved the enforcement of a state statute not previously found to be unconstitutional. In such a situation, a state judge should be able to apply that statute the way he believes right until told otherwise by an appellate court. For so doing, he should not be subject to a serious personal sanction as well.

A ruling such as Pulliam makes state judges overly cautious and, in close cases, produces flawed decisions shaded solely to avoid possible federal wrath, thereby diminishing the independence of every state judge.

Questions submitted by Senator Grassley
QUESTIONS FOR WITNESSES IN SUPPORT OF S. 590

1. In their letter to Chairman Hefl.. dated October 24, 1989, the NAACP Legal Defense and Educational Fund (LDF) states as follows:

> "It was clearly contemplated by Congress when it enacted the Civil Rights Attorneys' Fees Act of 1976 that fees be awarded against the appropriate governmental entity, whether state, county, or local."

The LDF cites a Senate Committee report (S. Rep. No. 94-1011 at p. 5) from the time of passage of Section 1988 as follows:

> "[I]t is intended that the attorneys fees, like other items of cost, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)."

The LDF goes on to note that at footnote 7 of the report, it is said that only where an official had acted in bad faith could he possibly be personally liable for fees.

DO YOU AGREE OR DISAGREE WITH THIS ANALYSIS OF THE LEGISLATIVE INTENT OF THE FEES ACT? PLEASE EXPLAIN.

A. I was a member of the House of Representatives and its Judiciary Committee at the time of the enactment of the Civil Rights Attorneys' Fees Award Act of 1976. I have no recollection that would indicate any expectations at that time on the part of the House of Representatives that the attorneys' fees so authorized would be collected from public funds. In any event, I do not agree with the suggestion that such was "clearly contemplated."

I do not view the footnote reference as a correct statement. "Bad faith" would not appear to be the controlling factor. It is the deprivation of one's constitutional rights, not the judges' motives, that subject her to sanctions. That is what brought Gladys Pulliam to the Bar!

2. The LDF letter criticizes S. 590 as follows:

"The provision dealing with injunctive relief would unduly hamper federal judges in the exercise of their judgment against state officials in the expectation that they will obey the law. If, however, a federal judge, based on the facts of the case before it, believes an injunction is necessary, he or she should be free to issue one. When this provision is coupled with the ban on attorneys' fees, civil rights plaintiffs will be faced with having to go back to court with no possibility of compensation for the time required."

DO YOU AGREE OR DISAGREE WITH THIS ANALYSIS OF WHY INJUNCTIVE RELIEF SHOULD BE AVAILABLE AGAINST STATE COURT JUDGES? PLEASE EXPLAIN.

A. In my view, S 590 permits the award of attorneys' fees where the declaratory decree has proven inadequate and injunctive relief is necessary. It is my understanding that the federal judges in attendance at the meeting of the American Bar Association which adopted the resolution supporting S 590 successfully urged the insertion of language in the resolution providing for the entry of a declaratory decree in these cases against judges and saying that injunctive relief could not be sought unless such a declaratory decree was then violated or declaratory relief was not available at all.

In my view, this is a reasonable limitation and would not unduly hamper federal judges in the discharge of their duties.

SENATOR HERB KOHL'S QUESTIONS FOR WITNESSES

1. Please provide a realistic example of a situation in which a judge's activities would be "clearly in excess" of his or her jurisdiction, justifying that officer's payment of costs under S. 590.

A. In Virginia, our state trial courts are courts of general jurisdiction, with the lowest level (general district courts) being limited to misdemeanor trials and to dollar amount ceilings in civil cases. But even here there could be theoretical examples of jurisdictional excess. For example, general district court judge could elect to hear a case for an amount above his jurisdictional dollar limit. Or a circuit judge could impose a criminal sentence above the limit fixed by statute.

2. Last year, at a hearing on the predecessors to S. 590, Morton Halperin of the ACLU made two points that may deserve consideration. First, he contended that the fairest solution is for states to pass statutes agreeing to be sued for costs in cases brought against state judges. "That would mean," Halperin said, "that you would sue the judge if necessary for declaratory or injunctive relief, but you then sue the State for the attorneys' fees." Second, Halperin stated:

> The normal comity between judicial officers and the respect for federalism which the Supreme Court has recently emphasized will, we believe, lead federal judges to bend over backwards to avoid issuing injunctions against state judges except in the most egregious situations. In such cases, where a state judge is continually violating the constitutional rights of persons under his or her jurisdiction, the federal court should be free to enjoin the action.

How would you respond to Halperin's and the ACLU's concerns?

A. As Judge Roth (and perhaps others) has replied to your question, some states on their own are considering or have put into effect statutory plans for indemnifying the sanctioned judge. Others have not and may not.

It is entirely likely that the judges guilty of "egregious" (Notorious) judicial conduct will not be protected as to costs by any state statute or by any informal policy to pay them for the judge's benefit. Nor should they be. Further, any judge who acts that way will have already felt the

> wrath of the state's judicial and inquiry commission and the state's Supreme Court and probably will be on his way out of office. In other words, the states are fully capable now of taking care of their own offenders in this regard and are willing to do so (assuming any such appear).
>
> In this day of generally enlightened social conduct, when great emphasis has been placed countrywide on the constitutional rights of individual citizens and on respect for them, it would be inappropriate to react to situations which at worse would involve only a few judges by jeopardizing the absolutely essential principle of judicial independence (for the benefit of all citizens).

Senator HEFLIN. Thank you.

This legislation has been around now for a good while and has opposition. We have endeavored to try to see at times if we could not work out some type of agreement to go ahead with passage, largely around the fact that an injunction could be issued, but attorneys' fees would not be assessed or could be assessed against a judge.

If such an agreement could be reached, how would this affect—while recognizing that injunctive relief can have some chilling effect, the fact that you would not have monetary sums placed against a judge, would that, in effect, solve some of the problems, or would there be other problems that would continue to exist if that were to be the case as to the legislation that was passed? Any of you can answer it, if you would like.

Justice WEISBERGER. I will start out, Senator.

It seems to me that once an injunction is issued against a judge, depending on the context in which it is issued, the effectiveness of that judge is terminated.

Let's suppose that we take Gladys Pulliam as an example or any judge who is ne se prius engaged in the setting of bail. Suppose that an injunction is issued, as it was against her, that she can't set bail with surety, excepting in certain circumstances. I don't see how that judge could handle arraignments ever again. I don't think that even a traffic judge, as Gladys probably was mostly, a misdemeanor judge, he or she has to decide whether or not you are going to have to set bail with surety to bring somebody before the court.

It doesn't make any difference whether the offenses are incarcerable or not. That constitutional decision was apparently made by Judge Bryan with almost no authority for that. You may very well have scofflaws who won't come before the court without some kind of bail being set. Suppose somebody doesn't show up three times and you issue a bench warrant and the person comes in. Suppose the offense is not incarcerable. Is it inappropriate to set bail with surety when a person won't come in under any other circumstances?

Now, this is just an illustration of how difficult it would be to operate as a judge who had been enjoined. Now, unless the injunction was so peripheral to that judge's duty that he or she would not likely run into it again, I don't see how the person could function.

My hero, Judge Morton today, how could he ever preside over a criminal trial where a question might arise about closing the court, even under the most impelling circumstances, if he had once been enjoined from doing it?

I think that to operate in that context is a virtual impossibility. And while obviously attorneys fees are important to us, it is I believe not the be all and end all of our venture, of our position in favor of S. 530. I think we need both the ending of injunctive relief and, of course, also the counsel fees. I firmly believe that.

Senator HEFLIN. Does anyone else care to comment on that?

Justice CARRICO. I feel generally the same way, sir. To be relieved of the fear of the financial aspect of it would be rather considerable, but there are features to this beyond the money. It is a very distracting experience, it is a very belittling experience, it is a very humiliating experience to be dragged into Federal court in these matters. It is also quite time consuming.

I wish I and my associates had kept track of the time that we have spent on Consumers Union, and if we charged even the minimum amount per hour that lawyers charge these days, I suspect it would have exceeded perhaps what we have ultimately paid out in counsel fees.

So, there are things beyond the money, sir, that are quite important to us. To put three words together here seems to be quite inappropriate—compromise, judicial independence. Certainly, if there was a specific proposal presented, I would be I think glad and it would be necessary for me to discuss with our associates in the conference. I certainly would not attempt to commit myself to it individually.

Senator HEFLIN. Any other comments that you would like to make on this?

Judge ROTH. I don't know, if it gets down, I agree with my two colleagues here that they sort of ride together. Injunction is a tremendously difficult problem for a judge to live with and would get to the heart of his effectiveness. If we sever the baby in half, I would say get us off attorneys fees. I think that would discourage, I would say, maybe 75 percent of the litigation. If there is no money in the pot—it has been proven here that so little is recovered that the impact is that a tremendous amount of money is going out in premiums on these insurance policies I just mentioned in my remarks, Senator.

They run over $2 million a year right now and there are about 2,662 policyholders, and that is of your general trial judges it is probably less than a third. When you look at the total picture of about 30,000 trial judges, with special courts and general courts, the amount of money they could go into the costs in the various attorney general offices around this State and if they have to pay for the time as part of their budget, plus these premiums, there is where it goes, where the damage is done. With Government costing so much now, this would be some saving and this is probably the only legislation you have that is going to be a money saver and, rather, it isn't going to cost anything.

Senator HEFLIN. Any other comments, Judge Nurre?

Judge NURRE. Senator, I would agree with what was just said by Judge Roth, if we are going to do it that is the place to do it. In my conversations with individual judges, I would think the chilling effect that that would still have would deter them from doing any number of things that they report that, well, we are just not going to do it because I am not going to put myself in the position to be enjoined. That has been my experience, in discussion with a number of other judges.

Senator HEFLIN. Mr. Butler, do you have anything?

Mr. BUTLER. Well, Senator, I just feel like that the limitations in S. 590 that the injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable still gives an opportunity for injunctive relief where it is really needed and I should think that that would be more than adequate to meet the objections to that aspect of it.

Senator HEFLIN. Explain what that means, where a declaratory decree was violated or declaratory relief unavailable?

Mr. BUTLER. Well, I am sitting here at a table with all the experts in the world on these two subjects, but my perception of it—and I believe this was Senator Hatch's amendment originally, was it not—is that basically if the issue is involved as it was in *Pulliam*, that a court should have first said this is an action for some kind of declaratory relief, have determined that this sort of activity was violative of the Constitution or whatever was at issue, and with that judgment then the court knows, the lower court knows that if it violates that, then it takes its chances, but at that time the State court must be aware that this position has been earlier taken by the Federal court.

Justice WEISBERGER. Can I give you another example, Senator? I perhaps am responsible for that language and I am responsible for it, because when we were discussing the ABA resolution in New Orleans, the Federal judges who wanted to support the resolution suggested this change, and let me give you an illustration.

In Consumers Union, that Chief Justice Carrico mentioned, there was no reason in the world why that judge, that district judge could not have issued a declaratory judgment saying that the Virginia rule on advertising was unconstitutional. He didn't have to enjoin the Supreme Court of Virginia. That was a demeaning, unnecessary affront to the highest court of a State.

I have no doubt that if a Federal judge in a competent jurisdiction issued a declaratory judgment saying that a certain practice or statute was unconstitutional, the State judges would either appeal it or they would obey it. And it seems to me to go beyond that is to indicate, I suppose you might say, a disrespect and a disregard for the State judiciary that I find almost impossible to believe can be widely held.

Senator HEFLIN. In those States where you have elected judges, is this more of an erosion of independence than it is where you have an appointive system? In other words, will they be more politically minded relative to chances of not issuing the proper judicial decision under the fear of that, in an elective setting the publicity or other aspects of it may well undermine the independence? Do you have any comment on that?

Judge NURRE. Senator, I come from an elective State, so I know a bit of what you are talking about, and the American judges I associate with from all over the country, probably most of whom are not elected and I don't really perceive much difference in that. But certainly, in a very controversial case where there is going to be a lot of publicity, even if attorneys fees were involved, that is a consideration and we have discussed that at the AJA and that is part of our report to you.

Senator HEFLIN. In the last Congress, Senator Hatch offered an amendment to the proposed legislation which would require that State remedies be exhausted before the Federal courts could step in and issue an injunction. What is your opinion of this sort of amendment? I suppose you would have to look at it from a viewpoint of is this preliminary to an injunction, would this be preliminary to a declaratory judgment approach, or would it be just by itself as an amendment. Those are three aspects that we could follow, but what is your feeling on the exhaustion of State remedies before the Federal courts can assume jurisdiction?

Judge ROTH. Senator, do you think that would make it even more difficult to get the bill through, to have that as baggage?

Senator HEFLIN. Probably. Our position would use that, probably.

Justice CARRICO. The opposition was there, though, before the amendment was made.

Senator HEFLIN. Yes. We can endeavor to try to work things out. We haven't been able to——

Justice CARRICO. Well, it is the rule followed in habeas corpus cases and it works I think to the advantage of both the State and the Federal judiciary.

Senator HEFLIN. Senator Thurmond had to leave. He is an important conferee in the conference between the House and the Senate on the Armed Services bill that is up. We pass it annually, and he had to leave. I think he had some questions and he will submit those in writing and we would appreciate your prompt response to them. And Senator Kohl wants to submit written questions, too, and he will submit them in writing and we will appreciate a prompt response to those questions.

At this point we like to place into the record statements submitted by the NAACP and the Alliance for Justice.

[Statements submitted for the record follow:]

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October 24, 1989

Senator Howell T. Heflin
Room 728
Hart Senate Office Building
Washington, D. C. 20510-6650

Re: S. 590

Dear Senator Heflin:

This letter is to reaffirm the opposition of the NAACP Legal Defense and Educational Fund, Inc., to the proposed amendment to 42 U.S.C. § 1988 that would provide immunity to judicial officers from both attorneys' fees and injunctive relief. The Legal Defense Fund stated its opposition in some detail last year, and here I will simply reiterate our basic position, i.e., that the bill is both unnecessary and counterproductive, since it would exempt a class of state officials from full relief in civil rights actions without there being any established need for such a measure. Our points are these:

1. In fact, judicial officers, like any other state officers, will never be faced with paying fees and costs out of their own pockets for acts done in their official capacities. It was clearly contemplated by Congress when it enacted the Civil Rights Attorneys' Fees Act of 1976 that fees be awarded against the appropriate governmental entity, whether state, county, or local. Thus, for example S. Report No. 94-1011, at p. 5, states:

> [I]t is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party). (Emphasis added).

The report goes on to note, in footnote 7, that only where an official had acted in bad faith could he possibly be liable for fees personally. This language was noted by the Supreme Court in Hutto v. Finney, 437 U.S. 678 (1978); in footnote 32, at page 699, the Court noted that it would be "manifestly unfair" to assess fees personally against state officials given the intent of Congress and the concern with intimidating such officials in the exercise of their duties.

Contributions are deductible for U.S. income tax purposes.

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is not part of the National Association for the Advancement of Colored People (NAACP) although LDF was founded by the NAACP and shares its commitment to equal rights. LDF has had for over 30 years a separate Board, program, staff, office and budget.

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2. Thus, we are unaware of any case in which a state judge has had to pay fees or costs out of his or her own pocket. Certainly, it is the uniform practice of the Legal Defense Fund, as well as all other such organizations to our knowledge, to seek fees against the governmental unit and not from the official personally.

3. The provision dealing with injunctive relief would unduly hamper federal judges in the exercise of their equitable power. Federal courts often enter declaratory judgments against state officials in the expectation that they will obey the law. If, however, a federal judge, based on the facts of the case before it, believes an injunction is necessary, he or she should be free to issue one. When this provision is coupled with the ban on attorneys' fees, civil rights plaintiffs will be faced with having to go back to court with no possibility of compensation for the time required.

Finally, we believe that the number of civil rights actions against state judicial officers are relatively few and far between. The unnecessary carving out of a privileged exception in the civil rights statutes for such officials would, we believe, send the wrong message to all concerned. For all of these reasons, we strongly oppose passage of S. 590.

Thank you very much for your consideration of our views.

Very truly yours,

Charles S. Ralston

Charles Stephen Ralston
Deputy Director-Counsel

Alliance for Justice

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Sierra Club Legal
Defense Fund

Women's Law Project

Women's Legal Defense Fund

December 7, 1989

Senator Howell Heflin
728 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Heflin:

The Alliance for Justice appreciates the opportunity to comment on S. 590. Once again, we want to express our opposition to this legislation which would bar the award of attorney's fees and limit injunctive relief in civil rights actions against state judges or judicial officers. Our opposition is based on essentially the same reasons that we presented in testimony against similar bills introduced in the past that would overturn the Supreme court's decision in Pulliam v. Allen, 466 U.S. 522 (1984).

The provision disallowing injunctions by federal judges except when a declaratory judgment is violated is both unnecessary and chilling to access to the courts. It is only in the exceptional case that a federal judge will enjoin a state official. However, if a judge believes that an injunction is warranted, s/he should be able to issue one. Additionally, no showing has been made by the bill's proponents that federal courts are interfering with the state judiciary.

In fact, the Pulliam case is an excellent example where injunctive relief was necessary to protect the plaintiffs' constitutional rights. This case involved litigation filed against a West Virginia state judge for sending two individuals to jail for non-imprisonable offenses. It is unlikely that an appeal would have afforded the plaintiffs in Pulliam any relief at all, given the short duration of their unconstitutional incarceration. One of the plaintiffs had been imprisoned for just four to six days -- and was free before any appeal could have been processed.

The Alliance also opposes the attorneys fees provisions in the legislation. The purpose of the Civil Rights Attorneys' Fees Awards Act of 1977, 42 U.S.C. 1988 was to assure that potential civil rights plaintiffs were not discouraged from bringing legitimate lawsuits simply because they could not afford effective counsel. Congress determined that without fee awards, civil rights suits would not be brought, and many egregious violations by government officials would go unchecked.

The Alliance knows of no instance where a state judge had to personally pay a fee award. In every case in which plaintiffs have been awarded fees against judges, the state has paid the award. Moreover, states are required by law to pay all attorneys' fees awarded against state officials operating in their official capacity.

In addition, a study prepared by the Conference of Chief Justices, reports that in 1983 litigation brought against judicial officials, more fee awards have been assessed against losing civil rights plaintiffs (which must be paid by the plaintiffs personally) than have been assessed in favor of winning civil rights plaintiffs. The report also notes that the number of cases brought against judges, in which fees are sought, is declining. Further, most of those that are filed are brought pro se, where fee awards are not obtainable.

We recognize that it is a legitimate concern that a judge be able to make an independent judicial decision free from any fear of reprisal. It is also clear, contrary to testimony of the ABA, American Judges Association and other proponents of the legislation, that Congress took concerns like this into consideration when it enacted the Fees Act. They determined then that the importance of encouraging civil rights actions outweighs other considerations. That determination is no less true today.

The Alliance urges the Subcommittee to take no further action on S. 590.

Sincerely,

Nan Aron
Executive Director

Senator **Heflin**. Thank you.

Justice **Carrico**. Thank you, sir.

Justice **Weisberger**. Thank you.

Senator **Heflin**. The subcommittee is adjourned.

[Whereupon, at 3:45 p.m., the subcommittee was adjourned.]

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